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LONDON, 2290

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ADAMS

The Hon.ble S.r James Mountague
Kt. Her Majestyes Sollicitor Gen.ll

A

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Ford *and* Sheldon's *Case.*

IN an Information in the Exchequer Chamber for the King, against Thomas Ford Esquire, Ralph Sheldon Esquire, and divers others; The Case was thus.

Thomas Ford was before the Statute of 23. Eliz. a Recusant, and for money lent to Sheldon, some before 23. Eliz. and some after, took a Recognizance in the names of some of the other Defendants, and took also a Grant of a Rent-charge to them in Fee, with condition of Redemption by Deed indented: And the Recognizance was conditioned for performance of Covenants in the said Indenture, and afterward the Statute of the 29. Eliz. was made, by which it was enacted, that if default of payment was made in any part of payment (viz.) of 20 l. for every month, &c. That then and so often the Queens Majesty by process out of the Exchequer may take, seise, and enjoy all the goods, and two parts, &c. And after the said Act, and before the 29 year of the Raign of the late Queen, Ford lent divers other great sums of money to Sheldon; and for assurance of it, took a Rent-charge by Deed indented, with condition of Redemption: And took also several Recognizances in the names of some of the other Defendants, for performance of Covenants, &c. as is aforesaid: which Recognizances did amount in all to the sum of 21000 l. all which were to the use of the said Ford, and to be at his disposition, and they were forfeited: And afterward, viz. 41 Eliz. Ford was convict of Recusancy, and did not pay 20 l. per mensem, according to the Statute. And, if upon all this case the King should have the benefit of these Recognizances, was the Question.

And this case was debated by Council learned on both sides in Court. And it was objected by the Council of Ford, that if the Recognizances had been acknowledged to Ford himself, they should not be forfeited to the King, for the Statute speaks only of Goods. And Debts are not included within the word (Goods). And therefore, if the King grant all the Goods which came to him by the Attainder of I. S. the Patentee shall not have debts due to him, for that the Grant only extends to Goods in possession and not to things in action. And this act is a penal Law, and shall not be extended by Equity.

2. It was objected that these Recognizances were acknowledged, to perform Covenants in an Indenture concerning a Rent-charge: And therefore savors of the Realty, and are not within the intention of the said act, which speaks only of Goods.

3. No fraud or Covin appears in the case; And then forasmuch as no Act of Parliament extends to this case, it was said, that the Common Law doth not give any benefit to the King: For at the Common Law, in far stronger case, if Cestuy que use had been attaint of Treason; this use forasmuch

much as it was but a trust and confidence, of which the Law did not take notice, it was not forfeited to the King, and could not be granted: and if an Use shall not be forfeited, of which there shall be a Possessio fratris, &c. and which shall descend to the Heir, A multo fortiori, a meer trust and confidence shall not be forfeited.

4. It was objected, that if the forfeiture in the case at the Bar accrues to the King, by the Statute of 29. Eliz. it ought to be by force of this word (Goods): But that shall not be without question in this case. For Ford hath not any Goods, but only a meer trust and confidence, which is nothing in consideration of Law.

And the Court cannot adjudg that these Recognizances belong to the King by equity of the said Statute, because it is penal: Also one Recognizance was taken in the names of some of the other Defendants, before the Statute of the 29. Eliz. which gave the Forfeiture.

And for that reason, it cannot be imagined that it was to defeat the King of a Forfeiture, which then was not in Esse, but given afterwards.

As to the first objection, it was answered and resolved by all the Barons, and by Popham chief Justice of England, and divers others of the Justices, with whom they conferred, that if the Recognizances had been acknowledged to the party himself, that they were given to the King without question, for personal Actions are as well included within this word, Goods, in an Act of Parliament, as Goods in possession. But inasmuch as by the Law things in action cannot be granted over for that cause by general grant (things in action (which only he may grant by his Prerogative) without special words pass not for what he can grant only by his Prerogative) can never pass by general words. And it was affirmed, that so it had been resolved before, that is to say, That Debts were forfeited to the King by the said Act of the 29. Eliz. And where the Statute saith, Shall take, seise, and enjoy all the Goods, and two parts, &c. Although a Debt due to a Recusant cannot be taken and seised, yet inasmuch as there is another word, viz. Enjoy, the King may well enjoy the Debt; And by process out of the Exchequer levy it, and so take and seise, refers to two parts of lands in possession, and enjoy relates to Goods.

As to the second objection, it was originally for the loan and forbearance of money. And as well the Recognizance as the Annuity were made for the security of the payment of the said money: Also when the Recognizances are forfeited, they are but Chattels personal.

As to the third Objection, there was Covin apparent: for when he was a Recusant continually after that Statute of the 23. Eliz. and for that chargeable to the King, for the forfeiture given by the same Act, it shall be intended that he took these Recognizances in the name of others, with an intent to prevent the King of levying of the forfeiture: And all the Recognizances which were taken in other mens names after the said Act, shall be presumed in Law to be so taken, to the intent to defeat the King of his Forfeiture: True it is, that an use or Trust shall not be forfeited for Treason or other offence by the Common Law, because it is not a thing of which the Common Law taketh any notice, for that Cestuy que use, hath neither Jus in re, nor Jus ad rem; but by the Common Law, when any act is done with an intent and purpose to defraud the King of his lawful duty, or forfeiture by the Common Law, or Act of Parliament, the King shall not be barred of his lawful Duty and Forfeiture, Per obliquum, which belongs to him by the Law, if the Act was made De directo.

And therefore if a man Out-lawed buy Goods in the name of others, the King shall have the Goods in the same manner, as if he had taken them directly in his own name: So if any Accountant to the King purchase

Lands

Lands in the names of others, the King ſhall ſeiſe thoſe lands for money due unto him. And this appears by the caſe of Walter Chirton. Trin. 24. Ed. 3. Rot. 4. in Scaccario, where the caſe was, that Walter de Chirton was indebted to the King, 1800 l. which he had received of the Kings Treaſure, and did purchaſe certain Lands with the Kings money; and by Covin had cauſed the Vendor to enfeoff his Friends in Fæ to defraud the King, and notwithſtanding took the Profits himſelf: and afterwards Walter Chirton was committed to the Fleet for the ſaid Debt. And all the matter was found by Inquiſition, and by Judgment the Land was ſeiſed into the Kings hands Quouſque; for in caſe of the King, an act done by Covin, Per obliquum, ſhall be equal to an act done De directo, to the party himſelf, For, Rex fallere non vult, falli autem non poteſt: See another Preſident, Trin. 24. Ed. 3. Rot. 11. Suis Regis, where one Thomas Favell was Collector of Tithes and Fifteens, and was ſeiſed of certain Lands in Fæſimple, and having divers Goods and Chattels, Die intromiſſionis de collectione & levatione, of Tenths and Fifteens Languidus in extremis alienavit tenementa ſua & bona & catalla diverſis perſonis, And died without Heir or Executor. In this caſe by the Prerogative of the King, Proceſs was made as well againſt the Ter-tenants, as againſt the Poſſeſſors of the Goods and Chattels, although they were not Executors, &c. Ad computandum pro collectione predicta, & ad reſpondendum & ſatisfaciendum inde Regi, &c. Et hoc per Cancellarium Anglice & Capitales Juſticiarios Anglice, & aliorum Juſticiariorum utriuſque Banci: quod nota bene.

As to the fourth Objection, Non refert, whether the duty do accrue to the King by the Common Law, or by Statute; but be it the one way or the other no Subterfuge that the party can uſe, can defeat or defraud the King: And although one of the Recognizances was taken before the Statute of 29. Eliz. yet that was to his uſe, and for that it is in the nature of a Chattel in him, and was taken in the names of others to prevent the Queen of her Forfeiture, which ſhe might have by the act of 23. Eliz. And although Ford was not convict until 41. Eliz. that is not material, for at all times before that he was ſubject to a Forfeiture for his Recuſancy.

Paſch. 4. *Jac.*

In the Chancery, 27 *Junii*, 29 *Eliz. Inter Johannem Dominum* S. *John de Bletro querentem, & Decanum, & Capitalem Gloceſtrie Defendentes.*

Appropriation, Procedendo, denied in Chancery.

The caſe was, that the Plaintiff brought a Quare Impedit in the Common Pleas againſt the Defendant, for the Church of Penmark, in the County of Glamorgan; which ſuit was ſtaid by Aid-prayer, and the Record was removed into the Chancery; upon which the Plaintiff moved for a Procedendo, and upon Oyer of Cauſe, before Sir Thomas Bromley Lord Chancellor, in the preſence of Sir Gilbert Gerrard Maſter of the Rolls, and Shute and Wyndham Juſtices, and Popham Attorney, and Egerton Solicitor of the Queen, the Plaintiff ſhewed a Gift in Tail of the ſaid Advowſon made to his Anceſtor in the 18 R. 2. and a verdict for his Anceſtor in the 12 H. 8. and a Preſentation by his Grandfather to the ſaid Church, of a Clerk who was admitted, inſtituted, and inducted, with poſſeſſion for certain years, and divers other matters to prove the Title of the Plaintiff, yet for this, that the Defendant and thoſe from whom he claims, time

out of mind, had had the poſſeſſion of the Parſonage as Impropriate (ſaving interruption for ſome ſmall time.) And for this that it ſhall be a dangerous preſident to the Quæn and others, Owners of Impropriations, being able to maintain the Appropriations to be perfect in all points and circumſtances, which are requiſite to the making of an abſolute and compleat Impropriation, the Appropriations being made of ancient time.

It was reſolved by this Court of Chancery, by the advice of the Juſtices and Council learned of the Quæn, that no Procedendo in loquela ſhould be granted.

Vide Ridley fol. 153,154. the beginning of Appropriations and of Annuities to be diſcharged of Tithes; It was after *Benedict* who was the Inſtitutor of Monks, &c. And note there the reaſon of Prayer being preferred before Preaching.

Vide 155. *ibid.* That the Saxon Kings appropriated eight Churches to the Monaſtery of *Croyland*, as appears by *Ingulphus* who was Abbot there.

Trin. 30. *Eliz.* In the Exchequer Chamber.

Inter Thomas Crimes & *alios Querentes*, & Henricum Smith *Defendentem.*

Endowment is preſumed when a Vicaridg hath long continued.

THe Caſe was ſuch: The Abbot of Sulby held the parſonage of Bulbenham in the County of Leiceſter appropriate, which as a Parſonage Impropriate came to King H.8. by diſſolution of Monaſteries, An. 31 H.8. who in the 37 year of his Reign, granted it in Fæ-farm; under which Grant the Plaintiff claimeth, the Defendant had obtained a preſentation of the Quæn, and to deſtroy the ſaid Impropriation did ſhew the Original Inſtrument of it, An. 22. Ed. 4. with condition, that a Vicaridg ſhould be competently endowed, & alledged that the ſaid Vicaridg was never endowed. And for that very cauſe the Impropriation was void, & in truth there was no inſtrument, nor direct proof of any endowment of the Vicaridg.

But for this that the ſaid Rectory was during all the time of the Impropriation ſuppoſed, reputed, and taken to be Appropriate, and by all that time a Vicar preſented, admitted, inſtituted, and inducted as a Vicar rightfully endowed, and paid his Firſt-fruits and Tenths:

It was reſolved by all the Court, that it ſhall be preſumed that the Vicaridg in reſpect of continuance was lawfully endowed, for that Omnia preſumuntur ſolenniter eſſe acta. And it ſhall be of dangerous preſident to examine the Originals of Impropriations of any Parſonages, and the endowments of Vicaridges, for that the Originals of them in time will periſh. And ſo it was decreed for the Plaintiff.

Hill. 4. Jac. Regis.

Inter William Bedle *Gen. Quer.* & Thomam Beard *Clericum*, Jacobum Wingfeild *Militem* & Mariam Wingfeild *Defend.*

Chancery. *Impropriation* not void becauſe of an Eſtate-tail in the Patron, Grantor, &c.

THe Caſe was thus, An. 31. Ed. 1. The King being ſeiſed of the Manor of Kimbolton, to which the Advowſon of the Church of Kimbolton was appendent, by his Letters Patents granted the ſaid Manor, with

the

the Appurtenances to Humphrey de Bohune Earl of Hereford, in Taile generale. Humphrey de Bohune the Iſſue in Tail by his Deed, in the 40. of Ed. 3. granted the ſaid advowſon then full of an Incumbent to the Prior of Stoneley, and his Succeſſors: And at the next avoidance they held it, In proprios uſus; And upon this appropriation made, Concurrentibus iis quæ in jure requiruntur, after the death of the Incumbent, the ſaid Prior and his Succeſſors held the ſaid Church appropriate, until the diſſolution of the Monaſtery, in the 27 H. 8. the ſaid Manno deſcended to Edward, Duke of Buckingham, as Iſſue to the ſaid Eſtate-tail. And the Reverſion deſcended to King H. 8. The Duke in the 13 H. 8. was attaint of high Treaſon, 14 H. 8. The King Granted the ſaid Manno, &c. with all Advowſons appendent, &c. to Richard Wingfield, and the Heirs Males of his body, 16 H. 8. It was enacted by Parliament, that the ſaid Duke ſhall forfeit all Mannors, &c. Advowſons, &c. which he had, &c. in 4 H. 8. The King, An. 37. H. 8. Granted and ſold for Money the ſaid Rectory of Kimbolton, as impropriate in Fee, which by mean conveyance came to the Plaintiff for 1200 l. An. 37. Eliz. Beard the Defendant did obtain a Preſentation of the Queen by Lapſe, pretending that the ſaid Church was not lawfully impropriate to the ſaid Prior of Stoneley.

1. For this, That Humphrey who did grant it to the Prior, had nothing in it, for that it did not paſs to his Anceſtor by theſe words (Mannerium cum pertinentibus.)

2. Or for this, that he had no more than an Eſtate in tail, and then by his death his grant was void.

But it was reſolved by the Lord Elleſmore, Lord Chancellor, with the principal Judges, and upon conſideration of Preſidents, that the Plaintiff ſhall enjoy the ſaid Rectory. For although that by any thing which can now be ſhewn, the impropriation is defective, for by nothing which now appears, the iſſue in tail had any thing in the Advowſon at the time of his Grant to the ſaid Prior, for that the Advowſon did not paſs by the Grant of the King, by thoſe words (Cum pertinentibus) yet it ſhall be now intended in reſpect of the ancient and continual poſſeſſion, that there was a lawful Grant of the King to the ſaid Humphrey, who granted in Fee, ſo that he might lawfully grant it to the ſaid Prior (Omnia preſumitur ſolenniter eſſe acta.) And all ſhall be preſumed to be done, which might make the ancient Impropriation good: For Tempus eſt edax rerum; And Records and Letters Patents, and other Writings, either conſume or are loſt, or imbezeled: And God forbid, that the ancient Grants and Acts ſhould be drawn in Queſtion, although that they cannot be ſhewn, which at firſt was neceſſary to the perfection of the thing: And if the Impropriation had been drawn in Queſtion, in the life time of any of the parties to it, they might have ſhewn the truth of the matter. But after the death of all the parties, and after ſo many ſucceſſion of ages. In all which the ſaid Church was eſteemed and allowed, to be rightfully impropriate.

If any objection or exception ſhould now prevail, the ancient and long poſſeſſion of the Owners of the ſaid Rectory ſhould hurt them. For if theſe objections or exceptions, had been made in the lives of the parties, without any Queſtion they had been anſwered, or otherwiſe in ſo many ſucceſſions of ages, it would have been impeached or impugned.

Mich.

Mich. 4. Jac. Regis.

Forfeiture. Treason.

HIl. 43 Eliz. A Case was moved to all the Justices, Tenant in Tail before the Statute of 27 H.8. made a Feoffment in Fee, to the use of himself and his Wife in tail: And after the Statute of 27 H.8. is made, the Husband was attaint of high Treason, 31 H.8. and died, the Wife continued in possession and died, their Issue enter, and die, and this descends to his Issue: And all this especial matter is found by an Office.

The Question was, If the Issue in tail, or the King, shall have the land; And it was objected that the right of the ancient Estate-tail cannot be forfeited for divers causes; Viz.

1. For this, that the ancient Estate was discontinued, & such right of action cannot be forfeited; As it is agreed in the Marquess of Winchesters case.

2. The Feoffer himself, as this case is, had not any right to the ancient Estate-tail (for by his Feoffment his right was utterly gone) was attaint, and he cannot forfeit what he hath not.

3. The Issue in tail is remitted to that ancient right which cannot be forfeited: And the new Estate-tail which was derived under the discontinuance, and which may be forfeited by the Statute of the 26 H.8. cap. 13. is continued; and by Act in Law, Viz. The discent and remitter avoided: And the Estate of the King may be divested out of the King by remitter, which is an Act in Law. As if discontinue of Tenant in tail, grant the Land to the King, his Heirs and Successors; and the King grant the land to Tenant in tail for life, the remainder to his Son and Heir apparent for life; Tenant for life dies, the Issue by Act in Law is remitted: And by this all the Estate of the King which he hath under the discontinuance, is divested out of him, and with this accords Plow. Com. 489. in Nicols Case: So in the case at the Bar, the new Estate under the discontinuance which was forfeitable, is now purged by the Remitter of that ancient right; and the Title which the King hath, by that defeated and avoided.

Resolved that in this case the Issue in tail was barred: and that which had been said, answered, confessed, and avoided. For truth it is, that right of Action cannot be given to the King, by the Statute of the 26 H.8. But when Tenant in tail discontinues his Estate to the use of himself in tail, & after is attaint of Treason, now by the Statute of 26 H.8. he doth not forfeit only the new Estate in tail, but by this the right of the ancient Estate is barred for ever: for the words of the Statute are, That every Offendor being lawfully convict of high Treason, &c. shall forfeit to the King, his Heirs & Successors, all such Lands, Tenements & Hereditaments, which any such offendor shall have of Estate of Inheritance: by which words, if there was not any saving, the right of the ancient Estate-tail was bound, then the saving is, saving to every person, &c. (other than the Offendors, their Heirs and Successors, and such persons as claim to any of their uses) all such rights, so that the Offendor and his Heirs are excluded out of the saving: For Heirs includes all manner of Heirs, and for this they are bound by the body of the Act.

And so note a diversity between a naked right of Action which is not forfeitable, and an Estate of Inheritance which is forfeitable, coupled with an ancient right for which the forfeiture of the Possession is barred by the said Act. And when all this appears by Office, then is the Issue in tail notwithstanding the Remitter barred by force of the said Act of Parliament, to which all are parties or privies: And it is not like to the Case in Plowden's Com. of Remitter, for this is no Bar of an ancient Right.

Pasch.

Pasch. 4. Jac. Regis.

At this Parliament held, Pasch. 4. Jac. Regis, It was moved and strongly urged at a Grand Committee of Lords and Commons in the Painted Chamber, that such Bishops as were made and created after the first day of this Session of Parliament were not lawful Bishops.

1. Admitting that they were Bishops, yet the manner and form concerning their Seals, Stiles, Process, and Proceedings in their Ecclesiastical Courts were not consonant to Law. And their reason was for this, that it is provided by the Statute of 1 Ed. 6. cap. 2. that from thencefoward Bishops should not be Elective, but Donative by the Letters Patents of the King: And that forasmuch as at this day all Bishops are made by Election, and not by Donation of the King, according to the Act; for this Reason, if the said Act of 1 Ed. 6. be not in force from the time that it took its effect, the Bishops are not lawful.

2. By the said Act of 1 Ed. 6. it is further enacted, that all Summons, Citations, and Process in Ecclesiastical Courts, shall be made in the name and stile of the King, and that their Seals shall be engraven with the Kings Arms, and that Certificates shall be made in the name of the King. And whereas the said Act of 1 Ed. 6. was repealed by a special Act, 1 Mar. Parliam. 1. cap. 2. Sess. 2. And the said Act 1 Mar. is now repealed by a branch of an Act, 1 Jac. cap. 25. versus finem, for by the same Act it is enacted, that the said Act of 1 Mar. shall be expressly repealed: The said Act of 1 Ed. 6. is now in force.

For when an act of Repeal is repealed, the first act repealed is revived, &c. as appears in Spencers Case, 15 Ed. 3. Title Petition 2.

And for this, it was concluded that the said 1 Ed. 6. cap. 2. being in force by a consequence all Bishops made after the Act 1 Jac. were not lawful Bishops: and for that their stile and proceedings after the same Act in the Name of the Bishop, and not in the name and under the Seal of the King; for this cause the Proceedings were unlawful, Quia non observata forma, infertur annullatio actus. And these were matters of great import and consequence.

As to these Objections, upon consideration had of them by commandment of the King, it was answered and resolved by Popham Chief Justice of England, and Coke Attorney of the King, and afterwards affirmed by the chief Baron, and the other Justices then attendant to the Parliament, upon good advice and consideration, that although the said act 1 Mar. be repealed, that yet the said act 1 Ed. 6. cap. 2. for other causes is not now in force, but remains repealed; yet true it is, that when an act of Repeal is repealed, the first act as hath been said stands in force, and is implicitè revived. But it is to be observed, that the said act, 1 Ed. 6. was repealed, annulled, and annihilated by three several acts of Parliament: And as a man which is bound by three several Bonds, although he break one or two of them, yet the third which remains whole will bind him: So when the words of three several acts repeal or annul an act, although that one or two of the acts of repeal or annullation are repealed, yet the other which remains in force, annuls the first act: First of all, the act of 1 Mar. expressly repealed the act of 1 Ed. 6. 2. and the act of 1 & 2 Phil. & Mar. hath likewise sufficient words to repeal and annul the said act of 1 Ed. 6. as to Stile, Seal, and Process, in Court Christian, although that the act of 1 Mar. Parl. 1. had never been made, the words of which act are, and the Ecclesiastical Jurisdictions of the Arch-Bishops, Bishops, and Ordinaries

dinaries to be in the same estate for proces of Suits, punishment of Crimes, and Execution of Censures of the Church, with knowledg of causes belonging to the same, and as large in these points as the said Jurisdiction was, An. 20. H. 8. And although that the said act of 1 Mar. hath by expres words repealed the said act of 1 Ed. 6. and for that it may be said, that the said act of 1 & 2 Phil. & Mar. could not repeal that which was repealed before; yet it was resolved that now, in as much as the repeal which the act of 1 Mar. operates is now annulled and repealed, it follows, that if now the act of 1 & 2 Phil. & Mar. be in force, or if the said act of the 1 Eliz. cap. 1. operate only as to the said act of the 1 & 2 Phil. & Mar. it makes that the said act of 1 Ed. 6. cannot also stand, Quia leges posteriores priores contrarias abrogant. But it was objected that the said act of the 1 & 2 Phil. & Mar. is repealed by the Statute of 1 Eliz. 1.. And it was answered and resolved that it is enacted by the act of the 1 Eliz. that the said act of 1 & 2 Phil. & Mar. and every branch and article of it (other than for such branches as be hereafter expressed) shall be repealed: and after by the other branch of 1 Eliz. It is enacted, that all other Laws, Statutes, and every branch thereof repealed and made void by the said act of 1 & 2 of Phil. & Mar. and not in this act especially mentioned and revived, shall remain and be repealed and void, as the same were before the making of the act: But the act of 1 Ed. 6. was as hath been said repealed by the act of 1 & 2 Phil. & Mar. and the act of 1 Ed. 6. is not revived, specially the act 1 Eliz. yet the act of 1 Ed. 6. remains repealed as it was before the second act, which hath sufficient words to repeal and annul the act of 1 Ed. 6. and to answer both the objections; the Statute of 1 Eliz. cap. 1. revives the act of 25 H. 8. cap. 20. . and further enacts, that it shall stand in full force and effect, to all intents, constructions and purposes. And by the said act of the said 25 H. 8. cap. 20.. It is provided that at every avoidance of any Arch-Bishop or Bishop, the King, his Heirs and Successors may grant to the Prior and Covent, and the Dean and Chapter, &c. a licens under the great Seal, as of old time hath been accustomed, to proceed to the Election of an Arch-Bishop, or Bishop, with a Letter missive, containing the name of the person which they shall elect and chuse, &c. And further by another branch in the same act, It is enacted, that every person chosen, elected, and invested, and consecrated Arch-Bishop or Bishop, according to the form and effect of this act, shall do and execute every the thing and things, as any Arch-Bishop or Bishop of this Realm, without the offending of the Prerogative Royal of the Crown, and the Laws and Customs of the Realm might at any time heretofore do: And these two branches answer to both the Objections, viz. For the manner of Election and Consecration of Arch-Bishops and Bishops, and also for the making and execution of all things which belong to their authority, as any Arch-Bishop or Bishop might have done before the making of the said act of 25 H. 8. within which words the Stile and Seal of their Court and the manner of their proceedings are inclosed. And now the act of 1 Eliz. cap. 1. having revived the act of 25 H. 8. and enacted that the same shall stand and be in full force and strength, to all intents, constructions, and purposes; from hence it follows, that the act of 1 Eliz. reviving the 25 H. 8. hath repealed the act of 1 Ed. 6. for in an act which was repeald, the Repeal is void and annulled: And this was the principal cause of the said resolution, for both the points upon which the said doubts were conceived. And it is to be observed, that the intention of the said Repeal by the act of 1 Jac. was to repeal the said act of 1 Mar—As to an act made 5 Ed. 6. by which it is enacted that the Matrimony of all and every Priest, and other Ecclesiastical and Spiritual persons shall be adjudged,

deemed

deemed, and taken, for just, true, and lawful Matrimony, to all intents, constructions and purposes: And that all Children born in such Matrimony shall be deemed and adjudged, to all intents, constructions, and purposes, to be born in lawful Matrimony, and be legitimate and inheritable, to Lands, Tenements, and Hereditaments; and that they shall be Tenant by the Courtesie, and Tenant in Dower, &c. so that now the said act of 1 Mar. being repealed, the said act of 5 Ed.6. cap.10. is now in force, and the Matrimony of all Ecclesiastical persons and their Issue, lawful and legitimate, to all intents, constructions, and purposes, by which the doubt amongst the vulgar is well explained.

But the Repeal of all the act of 1 Mar. by which divers other Statutes were repealed, being repealed generally without any reference as to the said act of 5 Ed.6. according to the intention of the Parliament Sub silentio, made the said scruple. And yet as it appears by this resolution upon manifest and direct matter, no inconvenience of the general Repeal of the said act 1 Mar. doth ensue.

And note, by our Books it appears, that if a Deacon or Priest take a Wife, the marriage was voidable by divorce, and not void, for they had not vowed Chastity: And for that, if they had Issue, and one of them dies, the Issue should be inheritable. But if a Monk, or Nun, or other Religious person which had made a Vow of Chastity, had married, this marriage is void: And this doth appear 5 Ed.2. Title Non-ability, 26.19. H.7. Title Bastardy 33. 21. H.7. 39. b.

Mich. 4. Jac.

IT was resolved in the Star-Chamber in the same Term, that the King had not the pre-Emption of Tin in Cornwal by any Prerogative. For Stanni fodina nec plumbi fodina, &c. or other such base Mines, do not belong to the King by his Prerogative, but to the Subject which is Owner of the Land: But the pre-Emption of Tin in Cornwal, belongs to the King as an ancient Right and Inheritance due to the King, as well of Tin in the Land of the Subject as in his proper Demesnes: And although that now a reason cannot easily be rendred of things done before time of memory, yet it may well be, that all the Land of the County was the Demesne of the King; And upon Grant of the Land the King reserved the Mines to himself, for these Mines of Tin are of great antiquity, as appears after, Ex Diodoro Siculo. Et certo certius est, that all the Land in England is derived mediately or immediately from the Crown, for all land is held mediately or immediately of the King, and for this reason such a Profit apprender may have a reasonable commencement: And where usage hath allowed it to the King, it doth belong to him. True it is, that all the County of Cornwal was within the Forest of the King: and that it was disafforested by King John, as appears by Camden. And what consideration the County gave for it to the King concerning Tin cannot now appear, but this appears plainly, that before the 33 Ed.1. all the Tin in Cornwal and Devon also, to whomsoever the Land belonged, appertained to the King: And this is proved by divers express Records, and by an ancient Charter of King John, amongst the Records of the Bishop of Exeter, in hæc Verba. Johannes Dei gratia Rex Angliæ, &c. Omnibus Ballivis salutem, Sciatis quod intuitu Dei & pro salute animæ nostræ, &c. dedimus, concessimus,

Tin pre-emption in Cornwal.

In Registr.

cessimus, ac presenti charta nostra confirmavimus Deo & Ecclesiæ Beati Petri
Co.4. Inst.232. Exon.& venerabili patri Simoni Exon.Episcopo & successoribus suis Exon.Episcopis, decimam de antiqua firma stanni in Com. Devon, & Cornubiæ: Habendam sibi & successoribus suis cum omnibus libertatibus & liberis consuetudinibus ad eam pertinentibus, per manus illius vel illorum qui stannarium habuerint in custodia, &c.

Paten. 1 H. 3. memb. 4. Rex, Roberto de Courtney salutem. Mandamus vobis quod sine dilatione & difficultate aliqua,habere faciatis Isabellæ Reginæ matri nostræ, stannaria com.Devon. cum Cuneo & omnibus pertinent.

Teste Com. Marischallo, &c.

4 H.3. Fines 5 H. 3. Rex concessit Johanni, Filio Richardi, stannariam in Cornubia reddendo 1000 **Marks.**

10 H.3.mem.9. Rex, &c. Sciatis quod Concessimus Richardo dilecto fratri nostro, stannariam nostram Cornubiæ, cum omnibus pertinentibus, **With Prohibition that none transport any Tin without license of the said** Richard.

10 Ed.2.Inqui. 2. num. 29. **For this that** Decima stannariæ nostræ in Com. Cornubiæ & Devon. **do belong to the Bishop of** Exeter; **It was therefore commanded to the said Sheriff to value the said Stannary, so that the Bishop may have that which to him doth belong,** viz. Vera decima Stannariæ; **In which note** Stannariæ nostræ:

33 Ed.1. grant all Tinners, vide Plow.com. 327. **Note, there are two several Charters, both bearing date** 10 Aprilis 33 Ed.1. **The one** Ad emendationem Stannariarum nostrarum in Com. Devon: **And the other** Ad emendationem Stannariarum nostrarum in Com. Cornubiæ: Concessimus eisdem Stannatoribus quod fodere possunt stannum & turbus ad stannum fundendum ubique in terris nostris, & vastis nostris, & aliorum quorumcunque in Comitatu predicto; Et aquas, & aquarum cursus divertere Ubi & Quoties opus fuerit, &c. ad Fundaturam Stanni,sicut antiquitas consuevit, sine impedimento nostro seu aliorum quorumcunque: Ac quod omnes Stannatores nostri prædicti totum stannum suum ponderatum, &c. licite vendere possunt cuicunque voluerint, faciendo nobis & heredibus nostris Cunageum & alias consuetudines debitas & usitatas,nisi nos vel heredes nostri stannum illud emere voluerimus.

33 Ed.1.in the Treasury. **The liberty granted to Tinners by the said Charter,** 33 Ed. 1. **granted to all Tinners; which Charter of** 33 Ed. 1. **made to the Tinners of** Devon **was confirmed** De verbo in verbo, An.4. Ed.2. **and was also confirmed,** An. 1. & 17 Ed. 3.

Rot. Almaine, Anno 12. E.3. part.1.num.17. De advisamento Concilii nostri ordinavimus quod stannum in Com. Cornubiæ & Devon ad opus nostrum capiatur pro defensione Regni nostri, &c. Et ad partes marinas celeriter mittatur,in auxilium & supportationem honorum nostrorum,&c. Ita quod hominibus quibus stannum illud capi contigerit, de pretio ejusdem stanni ad certos terminos solvend. sufficiens fecuritas per nos fiat, Assignavimus vos conjunctim & divisim ad capiendum,ad opus nostrum,totum stannum inComitatu predicto Cunitum & etiam Cuniend, cum cunitum fuerit. **And there is also authority given to take Carriages** Tam per Naves & battellos in Portibus Com. predict. existent. quam Carrecta & alia Carriagia quæcunque pro stanno illo usque ad Portum Southampton Carriando: **And commandment given to the Sheriffs,** Quod ipsi sumptis pro Carriagiis & aliis necessariis in hac parte inveniendis de exitibus ballivarum suarum solvant.

Edward

Edward the Black Prince deceased and the King (under the great Seal) confirmed (the same year) to Tydman of Limberge, Cunagcum stannariæ totius Ducatus Cornubiæ pro tribus annis. Nec non emptionem totius stanni, tam infra dictum Ducatum Cornubiæ quam Com. Devon solli & fodendi quod vendi debeat pro fine mille marcarum, & reddendo tria mille & quingentas marcas. 21 Ed. 3. cx Rot. Patent.

The said Charter was confirmed at the Suit of the Tinners, 8 Ric. 2. to the Tinners in Cornwal. 8 R. 2.

The said Charter of 33 Ed. 1. to the Tinners of Devon, was confirmed at the Suit of the Tinners, Anno 1 Ed. 4. 1 Ed. 4.

It was also at their Suit confirmed, 3 H. 7. to the Tinners of Devon. 3 H. 7.

Vide the Statute of the 11 of H. 7. by which it is ordained that a certain weight and measure shall be used throughout all England; Provided always that this act extend not, nor be in any wise hurtful, or prejudicial to the Prince within the Dutchy of Cornwal, or any weights belonging to the Coynage of Tin with the Counties of Cornwal and Devon, but that such Weights shall be used, &c. as have been accustomed. 11 H. 7. cap. 4.

The King gave Commission and power to Gilbert Brockhouse, to have preemption for and in the name of the said King of all white Tin within Cornwal and Devon, for one and twenty years, yielding three thousand marks Rent. 26 Apr. 7 E. 6. le Roy mordt in l'an ensuant, &c.

Note the stile of the said Courts of Stannaries in Cornwal and Devon, at all times, and during all the Reign of Queen Elizabeth, Mar, Ed. 6, H. 6, H. 7, Ed. 4, H. 6, H, 5, H. 4, &c. Magna Curia Domini regis Ducatus sui Cornubiæ apud Crokerenten in Com. Devon coram Johanne Comite Bedford, Custode Stannariæ dicti Domini Regis & Reginæ in dicto Comitatu Devon: By which it may appear, that at the first all the Tin in the County of Cornwal and Devon belonged to the King: And after the said Charters of 33 Ed. 1. the King may buy all if he will.

And note the antiquity of Tin Mines in Cornwal, Vide Camden in Cornwal, 121. extremum Promontorium quod oceano Vergivio incumbit, Diodoro Siculo dicitur Balerium: Et vide Diodor. Sicul. lib, 5. c. 8. fol. 142. b. Britanni qui juxta Balerium promontorium incolunt Mercatorum usu qui eo stanni &c. Camden in Cornw. f. 134. Diod. Siculus floruit sub Augusto.

And as for that, which was objected that the Charter of 33 Ed. 1. extends only to Tin within the Land of the King himself: It was resolved that by the said clause (Fodere & fundere stannum terris nostris & vastis nostris & aliorum quorumcunque, &c. Sicut Antiquitas consuevit, &c. It is manifest that the King hath all the Tin, as well in the Land of the Subject as in his own proper Land.

2. It shall be absurd that the King shall reserve the emption of his own Tin.

3. The King grants Stannatoribus nostris, divers Liberties and Immunities which are all enjoyed as well by the Tinners in the Lands of the Subject, as by those in the Lands of the King, &c.

In the Session of Parliament held in *Decemb. An.* 4. *Jac. Regis.*

Prerogative of the King in Salt-peter.

ALL the Justices, Viz. Popham chief Justice of England, Coke chief Justice of the Common Pleas, Fleming chief Baron, Fenner, Searl, Yelverton, Williams, and Tanfield, Justices, were assembled at Serjeants Inn, to consult what Prerogative the King had in digging and taking of Salt-peter to make Gun-powder by the Law of the Realm; And upon conference between them, these points were resolved by them all, Una voce.

I. Point.

That although the invention of Gun-powder was devised within time of memory, viz. in the time of R. 2. yet in as much as this concerns the necessary defence of the Realm, he shall not be driven to buy it in forreign parts; and forreign Princes may restrain at their pleasure, in their own Dominions: And so the Realm shall not have sufficient for the defence of it, to the peril and hazard of it: And therefore insomuch as Salt-peter is within the Realm, the King may take it according to the Limitations following, for the necessary defence of the Kingdom.

II. Point.

Although the King cannot take the Trees of the Subject growing upon his Freehold and Inheritance, as it was now lately resolved by us the Justices of England, and although he cannot take Gravel in the Inheritance of the Subject, for reparation of his houses, as the Book is in 11 H. 4. 28. Yet it was resolved that he may dig for Salt-peter, for this that the Ministers of the King who dig for Salt-peter, are bound to leave the Inheritance of the Subject in so good plight as they found it, which they cannot do if they might cut the Timber growing, which would tend to the disinheritance of the Subject, which the King by Prerogative cannot do; for the King (as it is said in our Books) cannot do any wrong.

And as to the case of Gravel, for reparation of the houses of the King, it is not to be compared to this case; for the case of Salt-peter extends to the defence of the whole Realm, in which every Subject hath benefit, but so it is not in the case of the reparation of the Kings houses: and for this it is agreed in the 13 H. 4. and other Books, that the King may charge the Subject for Murage of a Town, to which the Subjects were charged in the time of insurrection or War, for safety: and so for Portage, for this that he which is charged hath benefit by it, but the King cannot charge the Subject for the making of a Wall about his own house, or for to make a Bridg to come to his house; for that doth not extend to publick benefit: But when Enemies come against the Realm, to the Sea Coast, it is lawful to come upon my Land adjoyning to the same Coast, to make Trenches or Bulwarks for defence of the Realm, for every Subject hath benefit by it. And for this by the Common Law, every man may come upon my Land for the defence of the Realm, as appears 8 Ed. 4. 23. And in such case on such extremity they may dig for Gravel, for the making of Bulwarks; for this is for the publick, and every one hath benefit by it: but after the danger over, the Trenches and Bulwarks ought to be removed, so that the Owner shall not have prejudice in his Inheritance: And for the Common-wealth, a man shall suffer damage; as, for saving of a City or Town, a House shall be plucked down if the next be on fire: And the Suburbs of a City in time of War for the common safety shall be plucked down, and a thing for the Common-wealth every man may do without

without being liable to an action, as is said in the 3 H.8. fol.15. And in this case the Rule is true, Princeps & Respublica ex justa Causa possunt rem meam auferre.

It was resolved that this taking of Salt-peter is a purveyance of it for the making of Gun-powder., for the necessary defence and safety of the Realm. And for this cause, as in other Purveyances, it is an incident inseparable to the Crown, and cannot be granted, demised, or transferred to any other, but ought to be taken only by the Ministers of the King (as other Purveyances ought) and cannot be converted to any other use than for the defence of the Realm, for which purpose only the Law gave to the King this Prerogative; and it is not like to the Mines of Gold and Silver, for there the King hath interest in the Metal, and for this, there he may dig for it, Quia quando lex aliquid alicui Concedit, concedere videtur id, sine quo res ipsa esse non potest. Vide Plow. Com. in le Case de Mines. So the King may dig in the Land of the Subject for Treasure trove, for he hath property: And if the Powder which is so made by the Ministers of the King, begin to decay (as it will in two years) then it ought to be changed for other, or the money coming of it ought to be imployed for Powder for the defence of the Realm; or the Ministers of the King ought to make provision of Salt-peter which will endure a long time, and when need is, to make it into Gun-powder, which may be made before the Navy can be put in readiness. III. Point.

The Ministers of the King cannot undermine, weaken, or impair any of the walls or foundation of any Houses, be they Mansion houses, or Out-houses, or Barns, Stables, Dove-houses, Mills, or any other Buildings: And they cannot dig in the Flor of my Mansion house which serves for the habitation of man, for this, that my house is the safest place for my refuge, safety, and comfort, and of all my Family; as well in sickness as in health; and it is my defence in the night and in the day, against Felons, Mis-doers, and harmful Animals; and it is very necessary for the Weal-publick, that the habitation of Subjects be preserved and maintained. IV. Point.

And there are two notable Presidents, by which it appears, that the King by his Prerogative had power to prohibite Depopulation, and provide for habitation.

The one in the 43 Ed.3. Rot. claus. in Turri. numero 23. pro villa de Southampton.

The other, An.21.R.2. in dorso Clause. par.1. N.15. by which the King prohibits that, Incolæ villarum predictarum non prosternant domus suas in villis predictis in alias migraturi regiones. &c.

Also the Ministers of the King cannot dig the flor of any Barn imployed for the safe custody of any Corn, Hay, &c. of the Owner, for that the flor of a Barn cannot be made dry and serviceable again in a long time: But they may dig in the flors of Stables and Ore-houses, so that there be sufficient room left for the Horses and other Cattel of the Owner: And so that they repair it in convenient time, in so good plight as it was before; Also they may dig in the flors of Cellars and Vaults, so that there be sufficient room for the necessaries of the Owner; and so that the Wine, Beer, and other necessary provision of the Owner be not removed, or in any sort impaired, and they may dig any mud-walls which are not the Walls of any Mansion house, so that order be taken that the Mansion house be well defended, as it was before; so they may dig in the ruines and decays of any House or Buildings, which are not preserved for the necessary habitation of men.

They

V. Point. They ought to make the places in which they dig, so well and commodious to the Owner as they were before.

VI. Point. They ought to work in the possession of the Subject, but betwixt Sun rising and setting; so that the Owner may make fast the Doors of his House, and put it in defence against Mis-doers.

VII. Point. They ought not to place or fix any Furnace, Vessels, or other necessaries in any house or building of the Subject without his consent, or so near any Mansion house, as by it, it may receive prejudice or disquiet.

VIII. Point. They ought not to continue in one place over a convenient time, nor to return again into the same place before convenient time (which is long time) be passed.

IX. Point. It was resolved that the Owner of the Land cannot be restrained from digging and making Salt-peter, for the King hath not interest in it as he hath in Gold and Silver in the Land of the Subject, for the King in the case of Salt-peter hath but purveyance, so that the property of it is in the Owner, and for that he cannot be excluded of the Commodity in his own Land.

And it is to be observed, that before 31 Eliz. which was the next year after the Spanish Invasion, there was not any license or commission of any King or Queen of this Realm, for the taking of Salt-peter: But in the said 31 year there were two Licenses Granted.

The one particular to George Constable Esquire, and the other general to George Evelin, Richard Hills and John Evelin. The first gives Constable power and authority for eleven years to dig, open, and work for Salt-peter within the County of York, Notingham, Lancaster, Northumberland, Cumberland, and the Bishopzick of Duresme, as well within Our Lands, Grounds, and Possessions: as also within the Lands, Grounds, and Possessions of any of our loving Subjects within the Counties aforesaid: And the consideration of the Patent was for a great quantity of Salt-peter yearly by the said George Constable to be made and provided for the Store of the Queen, at a lower rate than before was paid.

And further, Our will and pleasure is, that the said George Constable, &c. shall at his own proper costs and charges, erect, make up, and lay all mud-walls, Stables, and Grounds whatsoever so digged up, &c. In which license it was observed, that no power is given to dig in any Mansion house, Barns, Dove-houses, &c. but, as appears in the last Clause, in mud-Walls, Stables, and Grounds; for the Clause of reparation ought without question to extend to all the places to which the power to dig extends, &c.

The other Commission to Evelin, &c. extends to all the Realm of England and Ireland, and all other dominions of the King, as well within our own Lands, Grounds, and Possessions, as also within the Lands, Grounds, and Possessions of any of our Subjects.

Note, the License begins with Lands, &c. so that Houses nor Buildings are not named in it: for the Learned Council of the Queen, as it should seem, who drew the License, thought not that the License ought to extend to the Mansion house, or other necessary houses; for otherwise it would have been expressed in the License. And after, Scilicet 18 Oct. 2 Jac. Commission was granted to Evelin, and others, to take Salt-peter in the Lands, Possessions, and other convenient places, and in convenient times, so that there were but three Licenses or Commissions ever made. And

in

in none of them any power by express words is given to dig in any Mansion house, &c. And in none of them is any Prohibition to the Subject to dig in his own Land: And it is observed that in the said last Commission is a clause, that for carriage none ought to go above nine miles from his own house, and that he shall have 4d. for every mile laden and empty, viz. Eundo & Redeundo. And the reason was, the Owner may return again to his own house in the same day: And note, Reader, here is a good Resolution of the Justices for the true Prerogative of the King in taking purveyance of Salt-peter.

Hill. 4. Jac.

Treason.

IN this very Term, one George Leak a Clark in Chancery, had upon an ordinary piece of Parchment, by great deceit, fixed with a kind of Glew, another Parchment so thin, as art could make it, so that it did appear but one piece of Parchment; And upon the thin piece, which was as it were the superficies of the other, he writ by good warrant a License, which was brought to the Lord Chancellor, and sealed with the Great Seal: And after, the said George took the thin piece upon which the writing was, from the other Parchment to which the great Seal was affixed, and then all was a Blanck with the great Seal annexed: And after the said George writ upon the blanck a Grant of the King of certain Lands: And what offence this was, was this Term debated amongst the Justices; And it was a great question amongst them, Whether this was high Treason or no: And it seemed to me, that this cannot be adjudged high Treason, until it was so declared by Parliament: For true it is, that the Statute of 25 Ed. 3. declares that if a man do counterfeit the great Seal or Privy Seal, that this is high Treason: And true it is, that the Judges in times past, viz. 2 H. 4. 25. have adjudged that the taking of that which was printed with the great Seal from one Patent, and fixing of it to another Writing made in the name of the King is a counterfeiting of the great Seal, for this that he abuseth the ancient Seal, in removing of it from the Patent, and fixing of it on another without warrant: And so Stamf. lib. 1. fol. 3. proves that it was adjudged in his time; and yet 40 Ass. pla. 33. that it was petit Treason after the Statute: And 37 H. 8. Title Treason, Brook by the Justices that this was not Treason: And I have seen a Record of 2 H. 4. the 25. where the party was indicted generally for counterfeiting of the great Seal; And the Jury found him not guilty of counterfeiting of the great Seal, as it was supposed by the Indictment: And found over the especial matter, that he took the great Seal from one Patent, and fixed it to another, and put this in execution: And judgment is given against the party. But without question against the Law, for as much as they found him not guilty of counterfeiting, for this is a full Verdict, and all the rest is Surplusage; but this case in question much differs from it, for in this case George Leak hath not any medling with the great Seal, but this remains now annexed as it did before: And for this reason it seems to me, if the Seal be fixed to a blanck Patent, and one writes a Grant in it, contrary to his direction and trust; or if one hath Letters Patents with good warrant made; and raise them in a place material, and put in other words, to the great prejudice of the King: In none of these cases can it be adjudged a counterfeiting of the great Seal. For the Statute of 25 Ed. 3. doth not speak of counterfeiting of writings, but only of the great Seal.

And

And the Delinquent in this case doth not meddle with the Seal, but only with the Writing. And I shewed a notable president in Clauſ. 42. Ed.3. memb. 8. in dorſo, where the Case was, that King R.1. by his Charter granted divers Lands and Liberties, Abbati de Bruera, in which the Abbot raſed out this Fiffetruda, and inſtead of it writ Eſt-leigh, And upon the ſhewing of it obtained a Confirmation of it from King Ed.3. and an allowance of it in Banco R. And for this offence the ſaid Abbot was called before the King and his Council, viz. in the Star-chamber; where the Abbot charged one Robert Rigg his Com-Monk, with the raſure: And the Abbot was convict (which could not be but in Court) and it was part of the Sentence, that the ſaid Charter-confirmation and allowance of it, ſhould be brought in by the Abbot to be cancelled. Out of which Record, I do obſerve five things.

1. The antiquity of the Star-Chamber, and this then was a Court, in which the Abbot was convict, and ſentence given.

2. That the ſaid Raſure was not any Counterfeit to the Great Seal; for if the offence had been high Treaſon, it ſhould not have been determined before the Council of the King in the Star-Chamber.

3. That Spiritual perſons were then puniſhable for offences before Temporal Judges.

4. That if there be raſure of a Deed between Subject and Subject, in a place material, all the Deed becomes naught: and the party to plead to it Non eſt factum. So if the Patente raſe his Letters Patents in any place material, all the Patent becomes of no force by the Law, as appears by the ſaid Sentence, All the Patent and all the dependance upon it, viz. The confirmation and allowance of it, ſhould be all cancelled and defaced.

5. That although that it is commonly ſaid, that an Abbot can do nothing in prejudice of his houſe, yet in this caſe he may do it, for the King ought not to be in worſe caſe than a Subject: And if the Abbot had raſed a Charter made to him by a Subject, in ſuch a manner as he had raſed the Charter of the King, the Deed of the Subject had become of no force: And ſo in caſe of the King. And then I conclude, that if the raſing of a Word in the Patent of the King, be not Treaſon, the raſing of two or three, or all the Words of the Patent, and writing a new Grant, is not Treaſon: And I recited another Preſident in An.R.2. in Parliament, where the caſe was, that the Ambaſſador of the Duke and State of Genoa, being here under the ſafe conduct of the King, for the buſineſs of the King and the Realm, was murthered by certain Subjects of the King: And this matter was debated in Parliament, and there reſolved, declared, and decreed, that this was treaſon: Note it well, this caſe was not referred to the Judges, but was declared in and by Parliament: For it is provided by the ſaid act of 25 E.3. that for this that many other caſes of like Treaſon might happen in time to come, which men cannot think nor declare at preſent, that if another caſe, ſuppoſed Treaſon, and which is not ſpecified in the act ſhall come before any of the Juſtices, the ſaid Juſtices ſhall ſtay without going to Judgment of Treaſon, until the caſe be ſhewen before the King in Parliament, who ought to adjudge it Treaſon or other Felony; In which branch two things are to be obſerved,

John-------- Imperiall.

1. That although a caſe happen like to the caſes of Treaſons mentioned in the ſaid act, that the Judges ought not (as they do in other caſes by equal and like reaſon) adjudg it to be Treaſon, for that branch reſtrains them: But this ought to be declared in Parliament; for the Words of the act are, Foraſmuch as many other caſes of Treaſon, like, &c. The Second thing is, that when a particular caſe (as the ſaid caſe of an Ambaſſador of a King) was adjudged high Treaſon, Et Legatos violare contra jus gentium

tium est: And it appears 2 Sam. cap. 10. Hanun Rex Amonitarum Legatos Davidis contumeliis, &c. super quo acerrimum bellum movetur, &c. By which it appears the consequence of an abuse of an Ambassadour, &c. Quod talis injuria est justi belli causa. Note that Legatus ejus vice fungitur, à quo destinatur; & honorandus est, sicut ille cujus vicem gerit. And afterwards George Leake, upon examination before the Chief Justice of England, made a clear confession of all the manner and circumstances of the fact; and upon examination, the case (as it was delivered to the Justices to consider of it, and to give their opinions) was such; George Leake joined two blanck Parchments fit for Letters Patents, so close together with mouth Glew, as they were taken for one, and did put one Label through them both; Then upon the uppermost he writ a true Patent and got the Great Seal put to the Label, so the Label and the Seal were annexed to both the Patents, the one written and the other blanck, then he cut off the glewed skirts round about, and took off the uppermost thin Parchment (which was written, and was a perfect Patent) from the Label which with the great Seal did still hang to the blanck Parchment; then he writ another Patent within the blanck Parchment, and did publish it as a good Patent: Hereupon two Questions were moved.

1. Whether this offence be high Treason, or no?

2. If it be high Treason, then whether he may be indicted generally for the counterfeiting of the great Seal, or else the special fact must be expressed: and the Justices were divided in opinion in the first point of the case: and my self and divers others held that this act was neither high Treason, nor petit Treason; because it is not within either of the branches of the said statute of 25 Ed. 3. but it is a very great misprision; and the party delinquent liveth at this day. But the Chief Justice and divers others were against us; And by reason of the diversity of opinions, Respectuatur, vide Fleata lib. 1. cap. 22. Item crimen Falli dicitur, cum quis illicitus cui non fuerit ad hæc data authoritas, de sigillo Regis rapto vel invento brevia chartacea consignaverit. As to the second point, it was resolved that if the special matter had amounted to counterfeiting of the great Seal in Law within the said Statute, then he might have been generally indicted of high Treason for counterfeiting the great Seal: as if a man in a fray kill a Constable that comes to keep the Kings peace without any express malice prepensed, this is murder in Law; and yet the delinquent may be generally indicted of murder by malice prepensed. 25 H. 8. cap. 12.

Hill. 24. Eliz.

Custom.

IN the Exchequer; a Merchant brought eighty weights of Bay-salt by Sea to a Haven in England, and out of the Ship sold twenty weights, and discharged them to another ship in which they were transported: but the said twenty weights were never actually put on the shore: And for the residue, viz. 60. he agreed for the Custom, and put them upon Land: And now the doubt was upon the words of the Statute of 1 Eliz. cap. 11. concerning Exportation, viz. sent from the Wharf, Key, or other place on the Land, and concerning Importation, take up, discharge, and lay on Land: If in this case the said twenty weights which always were water-born, and never touched the Land, ought to pay Custom as well inwards as outwards.

And it was resolved, that in both the cases Custom ought to be paid;

for the discharging out of the Ship upon the Sale aforesaid, amounts in Law to a putting them upon the Land, for in the Law this is Infra corpus comitatus: And if the Law shall not be so taken, the King may be defrauded of all his Custom, and in the case forasmuch as no Custom was paid, it was resolved that the Goods were forfeited, &c.

Note, a good diversity when the King shall be bound by act of Parliament, so that he cannot dispense with it by any clause of Non obstante. No act can bind the King from any Prerogative which is sole and inseparable to his person, but that he may dispence with it by a Non obstante, as a Soveraign power to command any of his subjects to serve him for the publick-Weal; and this solely and inseparably is annexed to his person: and this Royal power cannot be restrained by any act of Parliament, neither in Thesi, nor in Hypothesi, but that the King by his Royal Prerogative may dispence with it: for upon commandment of the King, and obedience of the Subject, doth his Government consist: As it is provided by the statute of 23 H 6. cap.8. that all Patents made or to be made of any Office of a Sheriff, &c. for term of years, for life, in Fee-simple, or in tail, are void and of no effect, any Clause or Parol de non obstante, put, or to be put into such Patents to be made, notwithstanding. And further, whosoever shall take upon him or them to accept or occupy such Office of Sheriff by vertue of such Grants or Patents, shall stand perpetually disabled to be or bear the office of Sheriff within any County of England by the same authority: and notwithstanding that by this act, 1. The Patent is made void, 2. The King is restrained to grant Non obstante, 3. The Grantee disabled to take the Office, yet the King by his Royal soveraign power of Commanding may command by his Patent (for such causes as he in his Wisdom doth think meet and profitable for himself and the Common-Wealth, of which he himself is solely judg) to serve him and the Weal-publick, as Sheriff of such a County for years, or for life, &c. And so was it resolved by all the Justices of England, in the Exchequer Chamber, 2 H.7. 66. And so the Royal power to pardon Treasons, Murders, Rapes, &c. is Prerogative incident solely and inseparably to the person of the King; and for this Non obstante an act of Parliament, to make the pardon of the King void and restrain the King to dispense with this by Non obstante, and to disable him to whom the pardon is made, to take or plead, it shall not bind the King, but that he may dispence with it; and this is well proved by the act of 13 R.2. Parl.2. cap.1. For by this it was enacted, that no Charter of Pardon from henceforth be allowed by whatsoever Justices, for Murders, Treason, Rape of a Woman, nor be specified in the said Charter, and if it be otherwise, Be the Charter disallowed.

Note, this was the surest way that the Parliament could take to restrain the King to pardon Murder, unless that he pardon it by express terms, which they thought the King would not, for they knew that the King could not be restrained by any act to make a Pardon; for mercy and power to pardon is a Prerogative incident solely and inseparably to the person of the King: and it hath oft-times been adjudged that the King can pardon Murder by general words without any express mention, with Non obstante the said Statute, sc 4 H.4.cap.31. In which it is ordained that no Welsh-man be Justice, Chamberlain, Treasurer, Sheriff, Steward, Constable of a Castle, Escheator, Coroner, or chief Forrester, nor other Officer whatsoever, nor keeper of Records, &c. in any part of Wales, notwithstanding any Patent made to the contrary, with clause of Non obstante licet sit Wallicus natus: and yet without Question, the King may grant with a Non

Non obstante. So Purveyance for the King and his Houshold, is incident solely and inseparably to the person of the King: and for this cause, the act of Parliament held in time of Henry 3. de tallagio non concedendo, Title purveyance, Rastal, which bars the King wholly of Purveyance, is void, as it appears in Co. lib. fol. 69. But in all such cases, although that the King may dispence with Statutes, yet a general dispensation or grant without Non obstante is void: But in things which are not incident solely and inseparably to the person of the King, but belong to every Subject and may be severed, there an act of Parliament may absolutely bind the King: As if an act of Parliament do disable any Subjects of the King, to take any land of his Grant, or any of his subjects (as Bishops) as it is done by the statute 1 Jac. cap. 3.) to grant to the King, this is good; for to Grant or take Lands or Tenements is common to every Subject: And for this it is not Proprium quarto modo, to Kings, Scilicet omni soli & semper, vide the Case of Deans and Chapters upon the Statute of 13 Eliz. vide 8 R. 2. cap. 2. & 33. H. 6. That none shall be Justice of Assize, &c. in the County where he was born, or did inhabit, and yet the King with special Non obstante may dispense with this, for this belongs to the inseparable Prerogative of the King, viz. his power of commandment to serve, &c.

Hill. 4. Jac. Regis.

NOte Mich. 4. Jac. post Prandium, There was moved a question amongst the Judges and Serjeants at Serjeants Inn, If the high Commissioners in Ecclesiastical causes, may by force of their Commission imprison any man, or no? High Commissioners, if they have power to Imprison.

First of all it was resolved by all, that before the Statute of 1 Eliz. cap. 1. the King might have granted a Commission to hear and determine Ecclesiastical causes: But then notwithstanding any clause in their Commission, the Commissioners ought to proceed according to the Ecclesiastical Law allowed within this Realm, for he cannot alter neither his temporal nor his Ecclesiastical Laws within this Realm by his Grant or Commission: Vide Caudries Case. 5 Report. And they could not in any case have punished any delinquent by Fine or Imprisonment, unless they had authority so to do by Act of Parliament. Then all the question rests upon the act of 1 Eliz. which as to this purpose rests upon three branches.

1. Such Commissioners have power to exercise, use, occupy, execute all Jurisdiction Spiritual and Ecclesiastical.

2. Such Commissioners by force of Letters Patents have power to visite, reform, &c. all Heresies, &c. which by any manner of Spiritual or Ecclesiastical power, &c. can, or lawfully may be reformed, &c. so that these branches limit the Jurisdiction, and what offences shall be within the Jurisdiction of such Commissioners, by force of Letters Patents of the King: And this is all, only such Offences may lawfully be reformed by the Ecclesiastical Law.

3. The third branch is, that such Commissioners after such Commission delivered to them so authorized, shall have power and lawful authority by vertue of this Act, and the said Letters Patents, to exercise, use, and execute all the Premises according to the tenor and effect of the said Letters Patents. This branch gives them power to execute their Commission. But it was objected, that this branch doth not give to the Quæn power by her Letters Patents to alter the proceedings of the Ecclesiastical

Law, or gave to the Queen absolute power by her Letters Patents, to prescribe what manner of proceedings, or punishment concerning the Lands, Goods, or bodies of the Subject; and this appears by the Title of the act restoring to the Crown the ancient Jurisdiction, so that the intent was to make restitution, and not any innovation in proceeding or punishment: And it was observed that this last branch gave to them power to execute all the Premises, according to the tenor and effect of the said Letters Patents, so that these words So authorised in the said Letters Patents, have relation only to the authority of the Letters Patents, before specified, viz. such as gave to them power to visit, reform, redress, order, correct, and amend, all Errors, Heresies, Schisms, Abuses, Contempts, and Enormities whatsoever; which by any manner of Spiritual or Ecclesiastical power, can or may lawfully be reformed, &c. These are the tenor and effect of the Letters Patents before remembred: And if any other construction shall be made,

1. It shall be against the express Letter, Scilicet, said Letters Patents.
2. It shall be full of great peril and inconvenience, for then not only imprisonment of body, but confiscation of Lands, Goods, &c. and some corporal punishment may be imposed, for Heresie, Schism, Incontinence, &c. Also power may be given to them to burn any man for Heresie, which shall be against the common Law of the Land.

See *Simpson*'s case in the forty second of *Eliz.* now reported by my Lord *Coke* in 4. Inst. 333.

Of the Stealing of Women.

Women. Felony.

NOte the Statute of 3 H.7. cap. 2. stands upon a preamble and a purview; the preamble is, where Women, as well Maids as Widows and Wives having substance, &c. and some being Heirs apparent, &c. for the lucre of such substance, be oftentimes taken by Mis-doers contrary to their wills, and after married, &c. or defiled: So note these three words in the Preamble, Viz.

1. Be taken,
2. Be married,
3. Be defiled.

The Purview is, that what person or persons from henceforth that taketh any woman so against her will unlawfully, viz. Maid, Wife, or Widow, that such taking, procuring, and abetting to the same, and also receiving the said woman so taken against her will, and knowing the same, be Felony. And that such Mis-doers, Takers, and Procurers to the same, and Receivers, knowing the said Offence in form aforesaid, be henceforth reputed and judged as Principal Felons; so that it is not said in the Purview so taken, married, or defiled, but only so taken against their will: And upon this great Question was moved, 4 & 5 Phil. & Mar. in the Star-Chamber, If the Eloinment against her will, without marriage, or carnal copulation (which is intended by this word Defiled) be Felony or no: And the opinion of Brook, and some other of the Justices was, that it was Felony; But Sanders chief Justice was against it; and afterwards, as Periam chief Baron did report, It was resolved by all the Justices in the 26 Eliz. that such Eloinment only is not Felony by the intent of the Statute, without marriage or carnal copulation, for the mischief was not only the taking, but the marriage or the defiling, which was (as it was said in the Preamble)

Preamble) to the disparagement of the said woman, and utter heavinesse and discomfort of her friends: And the Purview ought to pursue the mischief.

Secondly, this word So, hath reference to the Preamble, and all the mischief contained in it.

Note by the expresse Purview of the Act, the accessary both before and after is made principal, &c. but by a construction of the Common Law, they that receive the Mis-doers and not the women are accessaries: for this act makes the receivers of the women the principals.

Pasch. 4. Jac. Regis.

Aurum Reginæ.

NOte by the commandment of the King, it was referred to Popham cheif Baron, and my self, what right the Queen which now is, hath, and in what cases to a Right claimed by her, called Aurum Reginæ, that is to say, Pro centum marcis argenti una marca auri solvend. per illum qui sponte se obligat: And upon consideration had of it by a long time and view of all the Records and Presidents, Viz. Librum Rubrum in Scaccario, fol. 56. de Auro Reginæ, where it is said, that this is to be taken De iis qui sponte se obligant Regi, &c. which is the foundation of this Claim: And of a Record in the Tower, 52 H. 3. And of a Record in the Exchequer, 4 E. 1. And of a Record in the Exchequer, Hill. 12. Ed. 3. And in the Tower in the same year, in Rot. claus. And of Acts of Parliament, 15 Ed. 3. cap. 6. & 31 Ed. 3. cap. 13. and the 13 R. 2. in Turri, and divers other Presidents and Proces out of the Exchequer in the time of R. 2. H. 4. and other Kings, until the time of H. 7.

Resolution.

It was resolved that the Queen hath right to it, but with these limitations.

1. That it ought to be Sponte by the Subject sine coactione, so that this ought to be at the pleasure of the Subject, whether he will offer, or give, or no: And for this all Fines upon Judgment, or by offer or fine for alienation, or in any other case where the Subject doth not do it sponte sine aliqua coactione, viz. That the King of right ought to have it, there the Queen shall have nothing.

2. It ought to be Sponte, sine consideratione alicujus reventionis seu interesse, That the King hath in Esse, in Jure Coronæ: And for this upon sale or demise of his Lands, or Wares, or Goods of Felons, Out-laws, & simili casu, for these are Contracts and Bargains concerning the Revenues and Interests of the King: And it cannot be said in such case that the Subjects sponte se obligant, as to purchase, or buying any the Revenues or Interests which the King hath.

3. It ought to be sponte super considerationem, & non ex mera gratia & benevolentia Subditi; For that which is of meer Grace is not properly said of Obligation or Duty, and the words of the Records are to have De iis qui sponte se obligant, And so was it ordained by the King and his Council, as appears by the Record of Hill. 4. E. 1. in Scaccario, &c.

4. It ought to be Sponte super considerationem quæ non attingat reventionem seu interesse Coronæ, in any thing which the King hath: As if the Subject give to the King Sponte a sum of money for license in Mortmain or for to create a Tenure of himself, to have a Fair, Market, Park, Chase, or Warren, within his Manor, there the Queen shall have it: For the Subject did this Sponte, and was not constrained to it: And this doth not concern

cern any Revenue or Interest of the King: But if the King hath a Fair, or Market, or Park, or Warren, and grant it for a sum of money, there the Queen shall have nothing; for this was a thing in Esse, and parcel of the Revenue of the Crown: and by that it appears, that forasmuch as little or nothing is given in such case where this of right is due, this is not now of any such value as was pretended: And this resolution was reported to our Soveraign Lord the King by Popham, in the Gallery at Whitehall.

Pasch. 5. Jac. R.

Forests. Chases.

IN this same Term it was informed to the King that great wrongs were done in his Forest of Leicester in the County of Leicester; and in his Forest of Bowland in the County of Warwick, &c. parcel of his Dutchy of Lancaster: And upon this, by warrant of the King under his Signet, all the Justices were assembled to resolve certain questions, to be moved concerning the Forests by the Attorney of the Dutchy, and the Council of the other part, which were Forests and which Chases; the which being matter in fact, the Judges could not give their resolutions but by a way of direction: And it was resolved by them, that if these are Forests, it will appear by matter of Record, as by Eyres of Justices of Forests, Swanny-motes Officers of Forests, as Regardors, Agisters, Verderors, &c. But the appellation of it by the name of a Forest in Grants, Offices and Conveyances, is not any proof that this is a Forest in Law.

2. It was resolved by all the Justices, that if these are not other than free Chases, and no Forests in Law, then he who hath any Free-hold within them, may cut his Timber and Wood growing upon it, without any view or license of any: But if he cut so much, that there is not sufficient for Covert, and to maintain the Game of the King, he shall be punished at the suit of the King. And so if a common person hath Chase in another Soil, the Owner of the Soil cannot destroy all the Covert, but ought to leave sufficient Covert, and sufficient Brouse-wood, as hath been accustomed.

3. It was resolved, that within such a Chase the Owner of the Soil by prescription may have Common for his Sheep, and Warren for Conies, by grant or prescription: But he cannot surcharge with more than hath been used, then from which, &c, nor make Burrows in other places than hath been used from the time of which, &c. unless he hath Warren by Grant, and then he may use it according to his Grant; but he cannot erect a new Warren without Charter.

4. It was resolved, that he who hath such a Warren may lawfully build upon his Inheritance, within his Warren, a convenient Lodg for preservation of his Game.

5. It was said by Popham chief Justice, that it was adjudged in the time of the chief Baron Bett, in the Exchequer, that a man may prescribe to cut his Wood upon his own Inheritance within a Forest, although it was against the Act in the 43 Ed. 1. which is in the Abridgment, Title Forest 21. And this was the case of Sellenger, for the Wood in the Forest of Hay in the County of Hereford: And their reason was for this, that this was but a Declaration of the Common Law, and it may be tolled by Custom, as Littleton said: vid. 2. Ed. 2. Title Trespass, fol. 9. in the time of Ed. 1. Trespass 239. Plowd. Com. Dyer 72. 322 Ed. 4. cap. 7. that the Subject may have a Forest: But this is intended if he hath power to have Swainnimotts and Justices in Eyre and Foresters appendant to his Forests.

Consuetudo

Consuetudo ex rationabili causa usitata privat communem legem: And it was held by some that this was but an Ordinance, and not any Act of Parliament.

Pasch. 5. Jac. Regis.

IN this very Term between Rice ap Evan ap Floyd, and Richard Barker, one of the Justices of the Grand Sessions in the County of Anglesey, and others defendants: It was resolved by Popham and Cook chief Justices, the chief Baron, and Egerton Lord Chancellor, and all the Court of Star-Chamber, that when a grand Inquest indicts one of Murther or Felony, and after the party is acquitted, yet no conspiracy lies for him who is acquitted, against the Indictors, for this that they are returned by the Sheriff by process of Law to make enquiry of offences upon their Oath, and it is for the service of the King and the common-wealth. And as it is said in the 10 Eliz. 265. they are compellable to serve the Law, and the Court; and their Indictment or Verdict is matter of Record, and called Veredictum, and shall not be avoided by surmise or supposal, and no attaint lies. And for this reason they shall not be impeached, for any conspiracy or practice, before the Indictment: For the Law will not suppose any unindifferent, when he is sworn to serve the King: And with this agrees the Books in 22 Ass. 77. Assise. p. 12. 21 Ed. 3. 17. 16 H. 6. 19. 47 Ed. 3. 17. 27 H. 8. 6. F.N.B. 115 a. But it is otherwise of a Witness; for if he conspire out of the Court, and after swear in the Court, his Oath shall not excuse his conspiracy before; for he is a private person, produced by the party and not returned by the Sheriff, who is an Officer sworn, and the Jurors are sworn in Court as in different persons: And the Law presumes, that every Juror will be indifferent when he is sworn; Nor will the Law admit proof against this presumption.

Conspiracy doth not lie against a Juror or Indictor, but against a Witness.

2. It was resolved, that when the party indicted is convict of Felony by another Jury upon Not guilty pleaded, there he never shall have a Writ of Conspiracy, but when the party upon his arraignment is Legitimo modo acquietatus: But in the case at the Bar, the Grand Jury who indicted one William Price for the murther of Hugh ap William, the Jury who upon Not guilty pleaded, convicted him, were charged in the Star-Chamber for Conspiracy against him, and indicted and convicted, which manner of complaint was never seen before; for if the party shall not have a Conspiracy against the Indictors, when the Prisoner is acquitted upon his Indictment; à multo fortiori when he is lawfully convict, he shall not charge neither the Grand Inquest by whom he was indicted, nor the Jury who found him guilty: For the Law in such case doth not give any Attaint, for this that he was indicted by the Oath of twelve men at the least, and found guilty by twelve. And in these Cases, the King is the sole party to the proceedings against the Prisoner: But on the other side, when a Jury hath acquitted a Felon or Traitor against manifest proof, there they may be charged in the Star-Chamber for their partiality in finding a manifest Offendor not guilty, Ne maleficia remanerent impunita. And it will be a cause of infinite vexation and occasion of perjury and smothering of great Offences, if such averments and supposals shall be admitted after ordinary and judicial proceeding: And it will be a means Ad deterrendos & detrahendos juratores a servitio Regis.

3. It

3. It was resolved that the said Barker who was Judg of Assise, and gave judgment upon the verdict of death, against the said W.P. and the Sheriff who did execute him according to the said Judgment, nor the Justices of Peace who did examine the Offendor, and the Witnesses for proof of the murther before the Indictment, were not to be drawn in question, in the Star-Chamber, for any Conspiracy, nor any witness, nor any other person ought to be charged with any Conspiracy in the Star-Chamber, or elsewhere, when the party indicted is convicted or attaint of Murther or Felony: and although the Offender upon the indictment was acquitted, yet the Judg, be Judg of Assize, or a Justice of Peace, or any other Judg, being Judg by Commission and of Record, and sworn to do Justice, cannot be charged for Conspiracy, for that which he did openly in Court as Judg or Justice of Peace: And the Law will not admit any proof against this vehement and violent presumption of Law, that a Justice sworn to do Justice will do injustice, but if he hath conspired before out of Court, this is extrajudicial, but due examination of Causes out of the Court, and enquiring by testimonies & similia, is not any conspiracy, for this he ought to do; but subornation of Witnesses, and false and malicious prosecutions out of Court, to such whom he knows will be Indictors, to find any guilty, &c. amounts to an unlawful Conspiracy.

And if Records are of so high a nature, that for their sublimity they import verity in themselves; and none shall be received to aver any thing against the Record it self. And in this point the Law is founded upon great reason, for if the Judicial matters of Record should be drawn in question, by partial and sinister supposals and averments of Offenders, or any on their behalf, there will never be an end of Causes: But Controversies will be infinite, & infinitum in jure reprobatur: And for this it is adjudged in the 47 Ed.3. 15. That a Judg who hath a Commission, viz. That is of Record, shall not be charged in Conspiracy; which is to be understood of what he did in Court, for the reasons and causes aforesaid: And with this agrees the Book, 21 Ed.4. 67. & 27 Ass. pl. 12. And the reason is for this, that the party is acquitted; and the accusing stands with the Record: And accordingly was the Law taken in this case: But in a Hundred Court, or other Court which is not of Record, there averment may be taken against their proceedings, for that it is no other than matter in Pais and not of Record; as it appears in the 47 Ed.3.15. Also one shall never assign for Error against that which the Court doth as Judges, as to say that the Jury gave Verdict for the Defendant, and the Court did enter it for the Plaintiff, or to say that the party who levied the Fine was dead before the Fine was levied, or such like; Vide 1 H.6. 4. 39 H.6. 52. 7 H.7. 11 H.7. 28. 1 Mar. Dyer 89. But in a Writ of false Judgment, the Plaintiff shall have direct averment against that which the Judges in the inferior Court, have done as Judges, Quia Recordum non habent, and with this accords 21 H.6.34. And as a Judg shall not be drawn in question in the Cases aforesaid, at the suit of the parties, no more shall he be charged in the said Cases before any other Judg at the suit of the King: And for this in the 27 Ass. pl 18. One was indicted and arraigned at the suit of the King, as he was a Justice of Oyer and Terminer, where certain persons were indicted of Trespass before him, he made an entry of Record, that they were indicted of Felony: and it was adjudged that this Indictment was against the Law for this, that he was a Justice by Commission, and that is of Record: And this present act shall be to defeat the Record, hoc est, to aver against that which he did as Judg of Record, which cannot be by the Law, Vide 27 Ass.pl.23. 2 R.3.9. 28 Ass. pl. 21. 9 H.6.60. And it was said, that it was the case of one Nudigate, who as a Justice of Peace had recorded a force upon a View, which

Averment.

which he did as Judg upon Record; and a Bill was exhibited against him in this Court, for this, that he had falsely made a Record, where indeed there was not any Fore: And by the opinion of Catlyn and Dyer, chief Justices, it was resolved, that, That thing that a Judg doth as Judg of Record, ought not to be drawn in Question in this Court.

Note well, that the said matters at the Bar were not examinable in the Star-Chamber: And for this it was ordered and decreed by all the Court, that the said Bill without any answer to it, by the said Richard Barker shall be taken off the File and cancelled, and utterly defaced: and it was agreed, that insomuch as the Judges of the Realm have the administration of Justice under the King to all his Subjects, they ought not to be drawn into Question for any supposed corruption, which extends to the annihilating of a Record, or of any judicial proceedings before them, or tending to the slander of the Justice of the King, which will trench to the scandal of the King himself, except it be before the King himself; for they are only to make an account to God and the King, and not to answer to any Suggestion in the Star-Chamber; for this would tend to the scandal and subversion of all Justice. And those who are the most sincere, would not be free from continual Calumniations, for which reason the Orator said well, Invigilandum est semper, multæ insidiæ sunt bonis.

And the reason and cause why a Judg, for any thing done by him as Judg, by the authority which the King hath committed to him, and as sitting in the seat of the King (concerning his Justice) shall not be drawn in Question before any other Judg, for any surmise of corruption, except before the King himself, is for this; The King himself is De jure, to deliver Justice to all his Subjects: And for this, that he himself cannot do it to all persons, he delegates his power to his Judges, who have the custody and guard of the Kings Oath.

And forasmuch as this concerns the honour and conscience of the King, there is great reason, that the King himself shall take account of it, and no other.

And Thorp who was drawn in question for corruption, before Commissioners, was held against the Law, and upon that he was pardoned; and it is contained in the same Record, Quod non trahitur in exemplum. Vide the conclusion of the Oath of a Judg. Vide the Chronicle of Stow 18 Edw. 3. 312.

Note, Thomas Weyland Chief Justice of the Common-Bench, Sir Ralph Hengham Justice of the Kings Bench: and the other Justices were accused of Bribery and Corruption, and their Causes were determined in Parliament, where some were banished, and some were fined and imprisoned.

Vide 2 Ed. 3. fol. 27. That the Justices of Trayl-Baston (so called for their summary proceeding) were in a manner Justices in Eyre: And their authority was founded upon the Statute of Ragman, which you may see in the old Magna Charta. Vide the form of the Commission of the Trayl-Baston, Hollingshed, Chron. fol. 312. And note, it appears by the said President and Chronicle, that the King did examine the corruption of his Judges, before himself in the Parliament, and not by force of any Commission.

Absurdum est affirmare, re credendum esse non Judici.

An Oath before an Eccleſiaſtical Judg Ex officio.

The Ordinary cannot enforce a man to anſwer general Articles *Ex Officio.*

NOte, Paſch. 4. Jacobi, In the time of the Parliament the Lords of the Council of Whitehall, demanded of Popham chief Juſtice, and my ſelf, upon motion made by the Commons in Parliament, in what caſes the Ordinary may examine any perſon Ex officio upon Oath; and upon good conſideration and view of our Books, we anſwered to the Lords of the Council at another day in the Council Chamber.

1. That the Ordinary cannot conſtrain any man Eccleſiaſtical, or Temporal, to ſwear generally to anſwer to ſuch Interrogatories as ſhall be adminiſtred unto them, but ought to deliver to him the Articles upon which he is to be examined, to the intent that he may know whether he ought by the Law to anſwer to them: And ſo is the courſe of the Star-Chamber and Chancery; The defendant hath the Copy of the Bill delivered unto him, or otherwiſe he need not to anſwer to it.

2. No man Eccleſiaſtical or Temporal ſhall be examined upon ſecret thoughts of his heart, or of his ſecret opinion: But ſomething ought to be objected againſt him what he hath ſpoken or done: No Lay-man may be examined *Ex officio*, except in two cauſes, and that was grounded upon great reaſon: for Lay-men for the moſt part are not lettered, wherefore they may eaſily be inveigled and entrapped, and principally in Hereſie and Errors: And this appears by an Ordinance made in the time of Ed. 1. Title Prohibition.

Raſtal, the words of which Ordinance are, And *Quod non permittant, quod, aliqui Laici in balliva ſua in aliquibus locis conveniant, ad aliquas recognitiones per juramenta ſua faciendas, niſi in cauſis Matrimonialibus & Teſtamentariis.* And the reaſon that the Eccleſiaſtical Judg ſhall examine them in theſe two Caſes, is for this; that Contracts of matrimony, and the Eſtates of the dead are many times ſecret: And they do not concern the ſhame and infamy of the party, as Adultery, Incontinency, Uſury, Simony, hearing of Maſs, Hereſie, &c.

And for this cauſe in theſe caſes and ſuch like, the Eccleſiaſtical Judg ought not to examine Partem ream, upon their Oath; for as a Civilian ſaid, that this was Inventio Diaboli ad deſtruendas miſerorum animas ad infernum: And in the Regiſter, fol. 36. 6. There is a Prohibition in this form, Præcipimus tibi quod non permittas quod aliqui laici ad citationem talis Epiſ. aliquo loco conveniant de cætero ad aliquas recognitiones factas vel ſacramenta præſtanda (the one is the expoſition of the other) niſi in caſibus matrimonialibus & teſtamentariis: And there is an attachment upon it, Pone per vad. talem Epiſc. quod ſit coram Juſticiariis noſtris, &c. oſtenſurus quare fecit ſummoneri, & per cenſuras Eccleſ. diſtringi laicas perſonas vel laicos homines & fœminas ad comparendum coram eo ad præſtandum juramentum pro voluntate ſua ipſis invitis, in grave Coronæ præjudicium & dignitatis noſtræ Regiæ, nec non contra conſuetudinem Regni noſtri: Et habeas ibi Nomina plegiorum, &c. Teſte, &c. by which it doth appear that this was not only againſt the ſaid Ordinance, but alſo againſt the cuſtom of the Realm, which hath been time out of mind, but alſo in prejudice of the Crown and dignity of the King: And with this agrees F.N.B. fol. 41. And Vide the caſe reported by the Lord Dyer (but the caſe is not printed) Trin. 10. Eliz. one Leigh an Attorney of the Common pleas, was committed to the Fleet by the high Commiſſioners, in a cauſe Eccleſiaſtical, for this, that he had been at Maſs, and refuſed to ſwear to certain Articles to be propoſed to him. And although in ſuch caſe, Eccleſiaſtical Juriſdiction is ſaved by the Statute of 10 Eliz. yet they ought not in ſuch caſe to examine upon his Oath: And hereupon he was delivered by all the Court of Common Pleas upon the return of the matter upon a habeas corpus.

Note the delivery out of Priſon, was becauſe the high Commiſſion had no power to impriſon, ſee 2 Inſt. 333.

And

And in Mich. 18 Eliz. Dyer fol. 175. in Hinds case, who would not swear Commissionariis Eccles. super articulos pro usura, & ea de causa commissus est Gaolæ de le Fleet, He was delivered by Habeas corpus per totam curiam, This also was because they could not imprison.

Vide le Statute. 25 H.8. cap. 14. Which is declaratory as to this point: It standeth not with the right order of Justice nor good equity, that any person should be convict and put to the lois of his life, good Name, or Goods, unless it were by due accusation, and Witnesses, or by presentment, verdict, confession, or proces of Out-lawry, &c. And it is not reasonable that any Ordinary, upon suspition conceived of his own fantasie, without due accusation or presentment, should put any Subject of this Realm in infamy and slander of Heresie, to the peril of life, lois of good Name, or Goods; (Et paulo ante) the most expert and best learned man of this Realm, diligently laying wait upon himself, cannot eschew and avoid penalty and danger, &c. and if he should be examined upon such captious interrogatories, as is and hath been accustomed to be ministred by the Ordinaries of this Realm, in case where they will suspect any man of Heresie: And this was the Judgment of all the said Parliament, sæ F.N.B. Justice of Peace 72 Lamb. in his Justice of Peace 338 Crompt. in his Justice of Peace 36.6. In all which it appears that if any be compelled to answer upon his Oath, where he ought not by the Law, that this is oppression and punishable before a Justice of Peace, a Justice of Assize, &c. For this is an Article of charge; to enquire of all Oppressions: And as to that which was objected, that for a very long time, divers had been examined upon Oath in Ecclesiastical Courts: As to this it was answered, that it might very well be, and not against Law, for the words of the Treatise or Ordinance, and of the Register, are, Contra voluntatem eorum, &c. So that if any assent to it, and take it without exception, that is not Contra voluntatem eorum, but to enforce any to take it, who ought not to take it by the Law, is a great oppression: But if any person Ecclesiastical, be charged with any thing which is punishable by our Law, as for usury, there he shall not be examined upon Oath, for this, that his Oath is evidence against him at the Common Law, and to do it incurs the penalty of the Statute, but witnesses may be cited to testifie, Register, title Consult. F.N.B. 53 d. Also by the Statute 2 H.4. cap.15. it is provided, that Dictus Diocesanus per se vel per Commissarios suos contra hujusmodi personas, &c. Et ad omne juris effectum, publice & judicialiter procedat & negotium hujusmodi, &c. terminet juxta Canonicas functiones, which words, Juxta Canonicas functiones gives them power to proceed according to their Canons, and excludes the Common Law, and by pretext of this in the cases mentioned in the said Act, they examine as well Lay-people as Clerks, upon their Oaths concerning Heresie, erroneous opinions, &c. mentioned in the said act in the Reign of H.4. H.5. H.6. Ed.4. R.3. H.7. unto the time of the said act of 25 H.8. and for this in the Reign of H.8. nor in the Reign of Ed.6. no Lay-man was examined upon his Oath, except in the said two Cases of Matrimony and Wills: But in the Reign of Queen Mary, this Act of 2 H.4. was revived, and then all the Martyrs who were burnt, were examined upon their Oaths: And afterwards by the 10 Eliz. the said Act of 2 H.4. is repealed, by which the Common Law is in full force and effect: And for this cause all the pretence of possession and practice which the Ecclesiastical Courts have had, is strongly answered by this which hath been said, that the words of the said Treatise and Register are; Contra voluntatem eorum, &c. And those who have so taken it, have assented to it, and that stands with Law.

Mat. Paris 225, 226, 227, &c. Note, that King John after he had murthered his Nephew Arthur, and Niece Ellenor, the Issues of his elder Brother Geffrey, after he had lost Normandy, Aquitaine, and Anjou, after that his Commons for unjust vexation disobeyed him, his Nobles revolted from him, the Clergy oppressed by him, and that he stood excommunicated by the Pope, and his Kingdom interdicted, he for his protection granted by his Charter of 13 Maii Anno Regni 14. submitted himself to the obedience of the Pope: And after in the fourteenth year of his Reign, as one destitute of all succour and safety, and from day to day in fear to lose his Crown, by another Charter he resigned his Crown and Realm to the Pope Innocent, and his Successors, by the hands of Pandolph his Legate, and took it of him again to hold of the Pope, which was utterly void, for this, that the Dignity is an inherent, inseparable to the Royal Blood of the King, and descendable to the next of blood of the King, and cannot be transferred to another, no more than a Duke, or Earl, or Baron, or other Dignity may transfer over their Dignity, for these are incidents inseparable: Also the Pope was an Alien born, and therefore was not capable of Inheritance within England: By colour of which submission and resignation, the Pope and his Successors exacted great sums of the Clergy and Laity of England, pro commutandis pœnitentiis, to maintain the height and dignity of the Pope. And for the better inriching of the Coffers of the Pope, Pope Gregory the Ninth sent Otho Cardinalis de carcere Tulliano, into this Realm, when there was indignation betwixt H. 3. and his Nobles, to collect money for the Pope, who did collect infinite sums of money, so that it was said of him, Quod Legatus saginatur bonis Angliæ, which Legate held his Council at London, Anno Dom. 1237. & 22 H. 3. And for the better finding out Offences which should be redeemed with money, he with the assent of the Bishops of England there assembled, made divers Canons, amongst which one was Jusjurandum Calumniæ in causis Ecclesiasticis cujuslibet, & de veritate dicenda in spiritualibus quoque ut veritas facilius aperiatur & Causæ celerius determinentur Statuimus de Cætero prælari in Regno Angliæ secundum Canonicas & legitimas Sanctiones, obtenta in contrarium Consuetudine non obstante, &c.

By which Canon, it appears that the Law and Custom of England was against this examination of the party Defendant upon his Oath, for it is said Statuimus de Cætero præstari in Regno Angliæ, so that this was a new Law, and took its effect De cætero.

2. Obtenta in contrarium Consuetudine non obstante. And this very well agrees with the Register and the said Treatise De Regia prohibitione, and the other Authorities, That the Law and Custom of England was, that Lay-people in criminal causes, be they Ecclesiastical or Temporal, shall not be examined upon their Oath (only in causes matrimonial and testamentary) otherwise it is of Clerks, as is aforesaid: And for this, that it appears by the said Canon it self, that this was against the Law and Custom of England, whence it follows that this Canon shall not bind, for that the Law and Customs of England cannot be changed without an Act of Parliament, for this, that the Law and Custom of England is the Inheritance of which he cannot be deprived without his assent in Parliament: And it appears in Linwood, cap. jure jurandi, fol. 8. 6. That Boniface Bishop of Canterbury, An. 1272. & 57 H. 3. a little before the death of that King, made this Canon, Statuimus quod Laici de subditorum peccatis & excessibus corrigendis per prælatos & judices ecclesiasticos inquiratur ad præstandum de veritate dicenda sacramentum per excommunicationis sententias. Si opus fuerit compellantur impedientes, vero ne hujusmodi juramentum præstetur per interdict. est excommunicatio sententia arceantur. In which Canon, it is to be observed,

observed, that this extends to Lay-people; for, as appears, the Ecclesiastical Judg may examine those of the Clergy upon their Oaths; And note, Linwood cap. jure jurando, fol. 6. littera E. saith so, Hæc dicitur causa editionis hujus Statuti, viz. Prælati Ecclesiastici procedebant ad inquirendum de criminibus & excessibus subditorum suorum, & laici (nota hic) suffulti potestate dominorum Temporalium in hujusmodi inquisitionibus noluerunt jurare de veritate dicenda.

Note well what the cause was, why Lay-people refused to be examined for Crimes and Excess.

2. It appears, that the Judges of the Common Law, by their Prohibition did interdict, &c. as it appears by the Register and the other authorities, in the time of Ed. 1. and other Kings, Incroachments were made upon the Subjects which are here called Impediments, but now the Canon saith, Impellat.

3. That where by the Law they may examine Lay-people upon their Oath, In causis matrimonialibus & testamentariis: Here Boniface makes this Canon to extend to Peccata & excessus, which Canon was utterly against the Law and custom of England. In like manner another was made by him at the same time, Linwood cap. de benef. fol. 231. which Canon being made directly against the Judges, who did award Process against them, if they did impose any pecuniary pain: And prohibits them the Judges without fear of excommunication, the Canon being against Law, prohibits them notwithstanding this thundring of Excommunication in all ages. And the scope and purpose of the said Canon was to perplex the Subjects, and to enrich themselves by punishment pecuniary: And this is declared by act of Parliament made 9 Ed. 2. called Articuli Cleri. Si Prælati imponant Pœnam pecuniariam alicui pro peccato, &c. Regia prohibitio locum habet.

Trin. 5. Jacobi.

NOta, The Law so regards the Weal-publick, that although that the King shall have the Suit solely in his name for the redress of it, yet by his pardon he cannot discharge the Offender, for this, that it is not only in prejudice of the King, but in damage of the Subjects: for the avoiding of infinite Suits they cannot have private actions, and for that reason the Suit is given to the King, not only for himself, but also for all his Subjects, as if a man ought to repair a Bridg, and for default of reparation it falls into decay; in this case the Suit ought to be in the name of the King, and the King is sole party to the Suit, but for the benefit of all his Subjects. And for this, if the King pardon it, yet the Offence remains; and in any Suit in the name of the King, for redress of it, the Offender ought (notwithstanding the pardon) to make and repair the Bridg for the benefit of the Weal-publick, but peradventure the pardon shall discharge the Fine for the time past: And with this agrees, 37 H. 6. 4. 6. Plow. Com. in Nicols case 487. where the words of the Law are; If a Bridg or a High-way is repairable by the Subject, and is in decay, the pardon of the King shall not excuse him which ought to do it, for this, that the other Subjects of the King have interest in it. But note, if the pardon in such case shall discharge the Fine, but only for the time before the pardon: But for the time after the pardon, without question the Offender for his default shall be fined and imprisoned, the same Law, & a multo fortiori

Bonum publicum.

portion in case of Depopulation; for this is not only an Offence against the King, but against all the Realm; for by this the Realm is inabled, idle and dissolute people which are Enemies to the Common-wealth abound: And for this cause Depopulation and diminution of Subjects is a greater nusance and offence to the Weal-publick, than the hindrance of the Subjects in their good and easie passage by any Bridg or High-way: And for this, notwithstanding the pardon of the King, he shall be bound to re-edifie the houses of Husbandry which he hath depopulated, but peradventure for the time before the pardon he shall not be fined, but for the time after without doubt he shall be fined and imprisoned, for the Offence it self cannot be pardoned, as in the case of a Bridg or High-way; Quia est malum in se: But this continues as to the Fine and Imprisonment at all times after the Pardon: But the penalty inflicted by the Statute that may be discharged, Quia prohibitum. Vide 3 Ed.3. tit. Ass.443. Where an Abbot was bound to repair a Bridg by Prescription, and after the King by his Charter discharged him, which Charter was allowed in a Quo warranto. And after the Abbot was indicted at the Suit of the King, for default of reparation of the said Bridg, and he pleaded the said Charter and allowance: And notwithstanding it was adjudged that he should repair the said Bridg, for this, that although the Suit be in the name of the King for the Offence, yet the King cannot discharge it, for this, that it shall be no prejudice and damage of his Subjects: But when the King chargeth his Subjects for the making of a Bridg, or Cause, or Wall, &c. there the King may discharge in the Pontage, Murage, &c. But when one is bound by Prescription or Tenure, &c. to repair a Bridg, &c. there the King cannot discharge it. And all this appears in the said Book.

Vid. 35. H.6. 29. per Fortescue, & 16 Ed.3. grant 53.

And note, If one be bound to the King in a Recognizance for to keep the Peace against one, and other the Liege people of the King; in this case the King, before the Peace broken cannot pardon and release the Recognizance, as it is agreed in 11 H.4. 43. 37 H.6. 4. 1 H.7. 10. And the reason is, although the Recognizance be made to the King solely, yet inasmuch as this is made for the benefit and safety of the Subjects of the King, in such case it cannot be discharged.

Note, no licence can be made to do any thing that is Malum in se, but Malum prohibitum, 11 H.7. 11. 3 H.7. 39 H.6. 39.

Trin. 5. Jacobi.

Commissions.

NOte, Commissions in English under the Great Seal were directed to divers Commissioners within the Counties of Bedford, Bucks, Huntington, Northampton, Leicester, and Warwick, to enquire of divers Articles annexed to it: And the articles were also in English, to enquire of Depopulation of Houses, converting of arable Land into Pasture, &c. But the Commissioners should not have any power to hear and determine the said Offences, but only to enquire of them: And by colour of the said Commissions, the said Commissioners took many Presentments in English, and did return them into the Chancery, and after, Scil. Trin. 5. Jac. it was resolved by the two chief Justices, and by Walsmley, Fenner, Yelverton, Williams, Snigg, Altham, and Foster, that the said Commissions were against Law for three causes.

1. For this, that they were in English.

2. For

2. For that the Offences enquirable were not certain within the Commission it self, but in a Schedule annexed to it.

3. For this, that it was only to enquire, which is against Law, for by this a man may be unjustly accused by Perjury, and he shall not have any remedy, for this, that it is not within the Statute of 5 Eliz. &c. Also the party may be defamed, and shall not have any traverse to it, such a Commission may be only to enquire of Treason, Felony granted, &c. And no such Commission ever was seen to enquire only.

At the Common Law, Assises were not taken but before Justices in Eyre (Who sit virtute Brevis, every seventh year, vide Britton fol. 1. and Bracton lib. 5. & 11.) or in the Common Pleas: And this being a great molestation and trouble to the Recognitors of Assise, which Writ for the most part was in use, for the ease of the Country, and expedition of Justice; it was provided by Magna Charta, cap. 12. Quod recognitiones de nova disseisina, & de mor. de ancestor, non capiuntur nisi in suis Comitatibus, & hoc modo: Nos, vel (si extra regnum fuerimus) Capitales Justiciarii nostri mittent justiciarios nostros per unumquemque Comitatum semel in anno, qui, &c. capiant in Comitatibus illis Assisas predictas. And after was the Statute of Westminster 2. c. 30. made, and by this it is provided, Quod assignentur duo Justiciarii jurati, coram quibus & non aliis capiantur assisa, &c. ad plus per annum. By which Act, Justices of Nisi prius were constituted of other Pleas, as well of one Bench as the other, Coram quibus Justiciariis & societate (viz.) Coram duobus Justiciariis vel uno milite, &c. And by the same act the Justices of Nisi prius have power to give judgment, &c. in Assises of Darrain presentment, and Quare Impedit, then came the Statute of 21 Ed. 3. De Finibus, cap. 4. and provided Quod inquisitiones & recognitiones capiantur tempore vacationis, generally before aliquo Justiciario de utroque banco, coram quibus placitum deduct. fuerit associat. sibi, &c. And after by the Statute of York, cap. 3. It is provided, that in plea of Land the Nisi prius shall be taken before one of the Justices, where the Plea, &c. and Chapter 4. That no other Pleas moved by Attachment, or distress shall be taken before any Justice, either of the one Bench or the other generally, be the Plea before them or not, &c. by the Statute 14 Ed. 3. cap. 15. Nisi prius may be taken in any Plea, real or personal before two, so that the one be a Justice of the one Bench, or a chief Justice, or a Serjeant sworn.

By the Statute De finibus, cap. 3. Justiciarii ad assisas capiendas assignati deliberant Gaolas in Comitatibus illis sive infra libertates quam extra de prisonariis quibuscunque, Vide le recitat. del Statute of 28 Ed. 1. de appellatis, which recites the Statute de felonia, &c but not that Felony includes Trespass in ancient time, vide Stamf. 57. The Statute of 3 H. 3. cap. 7. gives power to Justices of Assise to hear and determine Treason, concerning false money: The Statute of 14 H. 6. cap. 1. provides that Justices of Nisi prius have power in all the cases of Felony and Treason to give their Judgment as well where the party is acquitted of the Felony or Treason, as where he is attaint, and to award execution, &c.

The Statute of 28 Ed. 1. De appellatis gives power to Justices of Assise to trie the appeals of approvers.

Justices of Assise by the Statute 34 & 35 H. 8. cap. 14. May write to the Clerk of the Crown De banco Regis, to certifie the first condition in their own name; but where Justices of one County or Circuit write to other to certifie the attainder of a Principle, the best form is in the name of the King, 2 & 3 Ed. 6. cap. 24.

By the Statute De Articulis super chartas, c. 10. & 4 Ed. 3. c. 11. & 7 R. 2. Justices of Assise may hear and determine Conspiracies, false informations, and Mal-procurers of Inquests and Juries to any Plaint, without

Writ

Writ and without delay, and of Confederacies, and Champerties, and Maintainers, Bearers, and Alliances by Bond, &c.

By the Statute of Northampton, 2 Ed.3. cap.3. Justices of Assise have power to hear and determine the Statute concerning Armor; also to punish the Justices of Peace, and others, who have not done their Office in such like cases, &c.

Justices of Assise ought twice in the year to proclaim the Statute, 32 H.8. and other Statutes against unlawful Maintenance, Champerty, Imbracery, and unlawful Retainers.

By the 3 H.7. cap.1. Justices of Assise take Bail of him who is acquit of Murther within the year, to answer the appeal of the party.

By 33 H.8. Justices of Assise cause the statute against unlawful games, to be proclaimed in their Circuit.

Justices of Assise make execution of the Statute, 13 H.4. cap.7. of Riots made in their presence, upon pain of a hundred pound, and by 2 H.5.c.8. Commission shall be awarded to enquire of the default of Justices of Assise and of the Peace.

By the Statute of Westminster 2. cap.37. & 2 Ed.3. cap.5. Justices of Assise ought to enquire of return or not return of Sheriffs.

Justices of Assise to enquire of all points of the Statute of 23 H.6.c.10. concerning Sheriffs, under-Sheriffs, and their Clerks, Coroners, Stewards of Franchises, Bayliffs and Guardians of Prisons, for their extortion, and for delivering of them who are not bailable, and for detaining those who ought to be bailed, 2 Mar. Dyer 99, Justices of Assise held plea in appeal of Murther, by W. 2. & 3. H.7. and of Robbery by Commission for Gaol-delivery.

23 Ed.3. cap. Justices of Assise may enquire of default, &c. of punishment of Victuallers, &c. who sell at unreasonable prices.

Note, Justices of Oyer and Terminer cannot by this authority enquire but of such, who are indicted before themselves, for their Commission is, Ad inquirendum, audiendum, & terminandum: But Justices of Gaol-delivery may arraign a Prisoner indicted before others, the words of their Commission are, Ad Gaolas, Gaolam de B. de prisonaribus in ea existentibus hac vice deliberandum secundum leges, &c. Brook Title Commission, 3 Mar. 24. 4. Ed. 3. c.2. That Justices of Gaol-delivery, deliver Prisoners indicted before the Guardians of the Peace. And by the Statute of 1 Ed.6. cap,7. New Commissioners of Gaol-delivery; But this doth not extend to Indictments, or conviction before the Commissioners of Oyer and Terminer: And the reason of this, is for this, that the indictments and proceedings before Justices of Oyer and Terminer, after the Oyer determined, ought to remain in the Kings Bench: And the Records before Justices of Gaol-delivery, remain with the Custos Rotulorum, vide Brook, Title Commission 12. 38 H.8. Title Oyer and Terminer, 44 Ed.2. 31.

Customs, Subsidies, and Impositions.

NOte, upon conference between Popham chief Justice, and my self, upon a judgment given lately in the Exchequer, concerning the imposition of Currants: And upon considerations of our Books, and of Statutes to this purpose: It appeared to us that the Rule of the Common Law is the Register, Title Ad quod dampnum, and F.N.B 222. A. quod patria magis solito non oneretur seu gravetur; Also there is another Rule, that the King may charge his people of this Realm without special assent of the Commons, to a thing which may be of profit to the Common people, but not to their charge; as is held in the 13 of H.4. 16. Et Statutum de Tallagio non concedendo, Nullum Tallagium, seu Auxilium per nos, seu heredes nostros ponatur seu levetur absque voluntate & assensu Parliamenti. Et Magna Charta,.

Charta, cap. 30. Omnes Mercatores (nisi publice antea prohibiti fuerint) habeant Salvum & securum conductum abire de Anglia & venire in Angliam, & morari & ire per Angliam, tam per terram quam per aquam, ad emendum & vendendum sine omnibus malis Tolnetis per antiquas & rectas consuetudines, præterquam in Tempore Guerræ, which Statute hath been confirmed more than thirty times by several acts of Parliament, vide le Statute 25 Ed. 1. 3 Ed. 1. in turri. 9 Ed. 3. cap. 1, & 2. 14 Ed. 3. 2. 25 Ed. 3. cap. 2, &c. The effect of which is, that every Merchant of this Realm, or other, may freely buy, sell, and pass the Sea with all their Merchandises, paying the Customs of ancient time used. Queen Mary put an imposition upon Cloaths, which the 1 Eliz. Dyer 165. was moved and not resolved, vide 31 H. 8. Dyer fol. 43. & 1 Eliz. 165. Magna Custuma & parva Custuma, vide 9 H. 6. 12, & 35. And note there the saying of Babington. Note the 1 Eliz. Dyer 165. there was Antiqua sive magna Custuma at the Common Law, scil. for Wools, Wool-fels, and Leather, and this was equal to strangers as Denizens. And in the time of Ed. 1. a Merchant stranger grants over the said Customs 3 s. 3 d. which is called Nova seu parva Custuma.

Upon all which and divers Records which we had seen, it appeared to us, that the King cannot at his pleasure put any imposition upon any Merchandise to be imported to this Kingdom, or exported, unless it be for advancement of Trade and Traffick, which is the life of every Island, Pro bono publico. As if in forraign parts any imposition is put upon the Merchandises of our Merchants, Non pro bono publico; and for to make equality, for the purpose to advance Trade and Traffick, the King may put an imposition upon their Merchandises, for this is not against any of the Statutes which were made for advancement of Merchandise, or of the Statute of Magna Charta cap. 30. which is, Si aliqui Mercatores, de terra contra nos guerrina inveniantur in terra nostra in principio guerræ attachientur, &c. Quo modo mercatores terræ nostræ tractantur, qui nunc inveniantur in terra illa, contra nos guerrina: Et si nostri salvi sunt ibi, illi salvi sunt in terra nostra; For the end of all such restraints is, Salus populi: And so in the case of Currants, which was now lately adjudged in the Exchequer: Also in the case of Customer Smith, which was adjudged in the Exchequer, in the Raign of Queen Eliz. both the impositions were imposed, upon the said reason to make equality; for this was the truth of both cases (Scil.) The advancement of Trade and Traffick, and for this cause such Impositions were lawful.

And it was clearly resolved by us, that such Imposition so put, cannot be demised or granted to any subject, for this, that it is to augment and decrease, or be quite taken away upon just occasion for advancement of Merchandise. And this was one of the reasons in Customer Smith's Case, that it could not be demised; also it was assessed after the demise.

And although that the King may prohibite any person in some cases with some Commodities to pass out of the Realm, yet this cannot be where the end is private, but where the end is publick, viz. to restrain the person, for this, that Quam plurima nobis & Coronæ nostræ prejudicialia in partibus exteris prosequi intendit, and to restrain any Merchandises either in time of Dearth, or in time of War, For Necessitas est lex temporis.

It appeared unto us also, that at the Common Law no Custom was paid, but only for Wools, Wool-fels, and Leather, which is called in Magna Charta, Recta consuetudo, and all others are there called Mala tolneta, which in the Statute De Tallagio non concedendo, is called Male. And at the beginning of the Raign of Kings, it hath for a long time been used, by authority and consent of Parliament, to grant to the King certain Subsidies

of Tunnage and Poundage, for term of his life, which began in such form, 2 & 3 H.5. in the 31 H.6.cap.8. & 12 Ed.4.cap.3. For the defence of the Realm, and maintenance of certain Wars by Act of Parliament, which proves, that the King by his own power cannot impose it, but by consent of Parliament; but such subsidie of Tunnage and Poundage might be granted by the King so long as he lived; for this, that this is limited and given to the King in certain: But an imposition put for equality, as hath been said, hath not any certain continuance, but is to be augmented, diminished, or taken away, for the benefit of the Common-wealth: And for that cause it cannot be demised, vide 31 H.8. Dyer 43. 1 Mar. D 92 1 Eliz. D.165. 2 & 3 P. & M. D.128. 12 Eliz. D.296. 23 Eliz. D.375. 45 Ed.3. cap.4. 27 Ass. pl.44. Register 192, &c.

Vide M. Ch. cap.30. they are called Consuetudines & per vocabulum artis, they are called Custuma, vide le Stat. 51 H.3. Title Exchequer in Rastal: It appears that there were ancient Customs, and those were for Wools, Wool-fels, and Leather, vide le Statute 9 Ed.3. cap.2. That all Charters, and Letters Patents made against free Trade and Traffick, made, or to be made, are void.

Vide Forteſc. in his Comment of the Laws of England, cap.3. 6. fol.43. Neque lex per ſe vel per miniſtros ſuos Tallagia, ſubſidia, aut quævis alia onera imponit Legeis ſuis, aut leges eorum mutat, vel novas condit ſine conceſſione & aſſenſu totius Regni ſui in Parliamento ſuo expreſſo, &c. vid.fol.13.cap.9.

And note for the benefit of the Subject, the King may make an Imposition or Toll within the Realm, to repair High-ways, Bridges, and to make Walls for defence: But then the Sum imposed ought to be proportionable to the benefit: And this appears the 13 Hen.4. 16. See the Imposition, for equality ought to be for the publick good, see the Charter 31 Ed.1. which is called Charta mercatoria ex Rot. mercator. an.31 Ed.1. n.42. Patents 3 Ed.1. n.1, & 9. de ſacco lanæ dimidium marcæ; laſta coriorum, 1 Mark, &c. Fines. 3 Ed.1. n.24. intus & non in dorſo, vide Rot. Parl. an.13. Ed.3. No new Inhansement of Customs without common consent: And in 22 Ed.3. n.8. against new Customs and Impositions, and that Merchants may freely pass, &c. And in the Parliament an.8. H.6. n.29. Amongst the new Impositions granted by H.5. upon Merchandises coming to Burdeaux. And Parliament 28 H.6. n.35. the Duke of Somerset accused for causing the King to grant unto Sir Pierce Bracy an Imposition of Wines.

Parl.9. R.2. n.30. against a Patent made to the Lieutenant of the Tower, by colour of which he took Custom of Wine, Oysters, and other Victuals, to be void.

29 Ed.3. 11.n. Ex Rot. Parliamenti, Subsidie of Wools granted for six years, so as during the same time no other aid or imposition be laid upon the Commons.

Parliament. 5. Ed.3. n.17,18,19. against new Impositions upon Staple Commodities, Parl.22.Ed.3. n.31. against alnage of Worsteds, 5 Ed.3.n.163. against all new Impositions, and 5 Ed.3. n.191. 38 Ed.3. n.26. Rot.Parl. against unreasonable Impositions.

Parl.7 R.2. n.35,36. 9 R.2.n.30. No Impositions or Taxes without consent of Parliament.

Note 2 R.2.Parl.apud Gloceſtriam, act.25. Subsidie only for defensive wars, not for invasive, 1 R.2. Parl. accord. 1 R.3. against Benevolence, Vide Clauſ. 4 Ed.3. n.22.bis.

In

IN the case in the Star-Chamber, between Edwards a Physitian Plaintiff, and Wooton Doctor in Physick Defendant. Libels. Star-chamb.

The Case was, That Doctor Wooton writ to Edmunds an infamous, malicious, scandalous, obscene Letter, to which he subscribed his name; And this he sealed and directed, To his Loving Friend Mr. Edward Spæd this: And after the said Doctor published and dispersed to others a great number of Copies of the said Letter.

And it was resolved by the Lord Chancellor Egerton, the two chief Justices. & per totam Curiam, that this was a subtle and dangerous kind of Libel: For inasmuch as the writing of a private Letter to another, without any other publication, the party to whom it is directed cannot have an Action Sur le case, for this, that no action lies; but when it is published to others to the scandal of the Plaintiff, as it hath been oftentimes adjudged, action lieth.

The Doctor thought that this could not be punished in any manner; But it was resolved, that the said infamous Letter, which in Law is a Libel, shall be punished (although it was solely writ to the Plaintiff without any other publication) in the Star-Chamber, for that it is an Offence to the King, and is a great motive to revenge, and tends to the breaking of the Peace and great mischief: And for that reason it was necessary, that it should be punished either by Indictment, or in the Star-Chamber, to prevent such occasions of mischief. But in the case at the Bar, the dispersing of Copies of it, or the publication of the effect of it, aggravates the Offence, and makes it a new Offence: For, for that also the party may have an Action sur le Case.

Note, that by the Civil Law, if any person hath disabled himself to bear any Office, or for any other purpose made a Libel against himself, he shall be punished for it. And so it seems to me, he should be in the Star-Chamber: for this is an Offence to the King and the Common-wealth: And without question, although that the Doctor subscribed his name to the said Letter, yet the said Letter importing the scandalous matter of a Libel, is in the Law a Libel.

Nota, the Law of the Lydians is, that he who slanders another, shall be let blood in the Tongue, and he who hears it and assents to it, in the Ear, &c.

Mich. 5. Jacobi.

INter Johannem Wooton quer. & Johannem Edwin Defendentem. In Replevin the Defendant avowed, and the Plaintiff demurred, and the Case was thus. Reservation.

William Haws was seised in Fee of a Messuage, and fifty five acres of Land, five acres of Meadow, and six acres of Pasture in Fromanton, in the County of Hereford: And 27 Jun. 28 H. 8. by Indenture demised the Tenement aforesaid to Nicholas Trahern for seventy nine years, Reddendo inde annuatim prefato Gulielmo Haws & assignatis suis 26 s. 8 d. at the Feasts of the Annunciation and St. Michael by even and equal portions: And after the Lessor died, and the Reversion descended to William his Son, under whom the said John Edwin claimed.

And the sole point in this case was, If the Rent reserved in this case shall go to the Heir, or shall be determined by the death of the Lessor, for if the Lessor had reserved the Rent to him without more, this shall determine by the death of the Lessor: and the addition of these words (And his Assigns) shall not enlarge the reservation, for if the Lessor had assigned the reversion over, yet the Rent shall determine by his death, for the Assigns cannot have the Rent longer than the Lessor himself should have it; And the Lessor himself hath it but for term of his own life, vide 18 Ed.3. title Ass.86. 10 Ed.4.18. 27 H.8. 19. per Audley & vide Hill. 33 Eliz. Rot.1341. In this Court in a Replevin, inter Richmond & Butcher, where the case was, that Butcher avowed for a rent as Heir to his Father, upon a Demise made by his Father of certain Lands for one and twenty years, by these words, Reddendo & solvendo proinde durante predicto termino 21 annorum prefato (Patri) Executoribus & assignatis suis 10 l. legalis monetæ Angliæ, &c. ad festa, &c. And it was adjudged, that by this reservation the Heir should not have the Rent, for that the reservation was made to the Father, his Executors, and Assigns, and not to his Heirs, &c.

Mich. 5. Jacobi.

Corane, Buggary. Nota, Bugrone Italice, *is a Buggerer, and* Buggerare *is to* Buggar, *so Buggary cometh of the* Italian *Word.*

The Letter of the Statute of the 25 H.8.cap.6. If any person shall commit the detestable sin of Buggary with Mankind, or Beast, &c. it is Felony, which act being repealed by the Statute 1 Mar. is revived and made perpetual by 5 Eliz. cap.17. And he shall lose his Clergy.

It appears by the ancient Authorities of Law, that this was Felony; but they vary in the punishment, for Brit. cap.9. saith, that Sorcerers, Sodomers, and Hereticks shall be burnt, F.N.B. 269. a. agrees with it: But Flet. lib. 1. cap.35. Pecorantes & Sodomitæ terra vivi ceu fodiantur. But in the ancient Book called the Mirror of Justice vouched in Plow. Com. in Fogosses Case, the Crime is more high, for there it is called Crimen læsæ Majestatis, a sin horrible, committed against the King of Heaven: And this is either against the King Celestial, or Terrestrial in three manners, by Heresie, by Buggary, by Sodomy. Note, that Sodomy is with Mankind, and it is Felony by the Statute of 25 H.8. and therefore the judgment for Felony doth now belong to this offence, viz. to be hanged by the neck till he be dead. To make that Offence Oportet rem penetrare, & semen naturæ emittere, & effundere, for the Indictment is Contra ordinationem Creatoris & naturæ ordinem rem habuit venereum, dictumque puerum carnaliter cognovit. Every of which (rem habuit, & carnaliter cognovit) imply penetration and emission of Seed: And so it was held in the case of Stafford, who was attaint in the Kings Bench and executed. Pæderastes amator puerorum, whereof the Greek word is, Παιδεραστὴς; Buggary with Boys, Vide Rot. Parl. 50. Ed.3. num.58. complained in Parliament, that a Lumbard did commit the sin that was not to be named: So in Rape, there ought to be penetration and emission of Seed, vide Stamford fol.44. Which Statute makes it Felony, he who procures, &c. or receives the Offender, &c. is accessary.

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The words of the Statute of West.1. cap.34. If a man ravish a woman 11 H.4. 18. If one aid another to commit Rape, and if he be present, he is principal in the Buggary, vide Lev. 18. 22. & cap.10. 13. 1 Cor.6.

Premunire. Vid.15 H.7. 9. Præmunire was at the Common Law.

NOte, in the Book of Doctor Cosines, intituled, An Answer, &c. to the Abstract, and published 1584. And a Pamphlet now lately published by Doctor Ridley, they would obtrude upon the World, That forasmuch as that now by the act 10 Eliz. cap.1. all Spiritual and Ecclesiastical power within this Realm is annexed to the Crown, and the Law by which they determine causes, which belongs to their Cognizance, is the Ecclesiastical Law of the King: That for that cause no Premunire lies against any Spiritual Judg for any Cause whatsoever. And some other of their Profession have some other reasons to confirm it.

1. That when the Statute of Premunire was made, viz. in the Reign of the Kings Ed.3. & R.2. then the Pope usurped Ecclesiastical Jurisdiction, although that De jure it belonged to the King. And therefore forasmuch as the King is as well De facto, as De jure, supream head of all, as well Ecclesiastical as Temporal; now the Cause being changed, the Law is changed also.

2. The conclusion of the Writ of Premunire is in Domini Regis contemptum & præjudicium, & dictæ Coronæ & dignitatum suarum læsionem & exhæredationem manifestam, & contra formam Statuti, &c. Which proves that the Jurisdictions shall be now severed and united to the Crown; For that which is united to, and derived from the Crown, cannot be said contra Coronam & dignitatem Regis.

3. The Court of high Commission is the Court of the King, and is by force of an act of Parliament, and Letters Patents of the King: And for this, although it may be said, that the Consistory Courts are Curiæ Episcoporum, yet the Court by force of high Commission is the Court of the King: And for that reason their proceedings shall not be subject to Premunire.

4. This new Court is erected by Act of Parliament, and Letters Patents of the King: And for this, where the Statute of R.2. speaks De Curia Romana seu alibi, &c. This (alibi) cannot extend to a Court erected by Parliament, An.10. Reg. Eliz.

But to these Objections, it was answered and resolved by divers Justices in this very Term, that without question the Statutes 27 Ed.3. 16 R.2, &c. De præmunire, are yet in force: And all such proceedings, by colour of Ecclesiastical Law before any Ecclesiastical Judges who were in danger of Premunire, before the said act 1 Eliz. are now in case of Premunire after the said act; be it before the Commissioners by force of high Commission, or before Bishops or other Ecclesiastical Judges: For the said acts of Premunire are not repealed by the said act 1 Eliz.

And as to the first and second Objections, it was answered, that true it is, that the Crown of England hath as well Ecclesiastical as Temporal Jurisdiction, De jure annexed to it, as appears by the Resolution in Cawdries case, from age to age: And although this was De jure, yet when the Pope became so potent and powerful, he did usurp upon the Kings Ecclesiastical Jurisdiction within this Realm; but this was but mer usurpation (for the King cannot be put out of the possession of any thing which belongs to his Crown.) And for this reason all the Kings of this Realm Totis viribus proinde, for the establishment of their temporal Law, by which they inherit the Crown, and by which they govern their Subjects in Peace, and punish those who are rebellious, or who commit great Offences against them and their Crown: And they were always jealous least

any

any part or point of their temporal Law should be incroached upon: And for this, if the Ecclesiastical Law usurp any thing upon the temporal Law, this was severely punished: And the Offender esteemed and adjudged an Enemy to the King by the ancient Statutes; and every one might have killed him before the Statute 5 Eliz. and this is the reason for why: although both Jurisdictions belong to the Crown, yet inasmuch as the Crown it self is directed defendable by the Common Law, and all Treason against the Crown punished by this Law; for this cause, when the Ecclesiastical Judge usurps upon the Common Law, it is said Contra Coronam & dignitatem &c. And all the Prohibitions directed to the high Commissioners from year to year, from the time of the making of the said Statute 1 Eliz. doth conclude, Contra Coronam & dignitatem Regiam.

For as it was resolved by all the Justices, Pasch. 4. Jac. Reg. est contra Coronam & dignitatem Regiam, when any Ecclesiastical Judge doth usurp upon the temporal Law, because, as in all those Writs it appeareth, the interest or cause of the Subject is drawn ad aliud examen, that is, when the Subject ought to have his cause ended by the Common Law, whereunto by birth-right he is inheritable, he is drawn in aliud examen (viz.) to be decided and determined by the Ecclesiastical Law: and this is truly said Contra Coronam & dignitatem Regiam. And this appears by all the Prohibitions (which are infinite) which have been directed to the high Commissioners and others after the said act 1 Eliz. A fortiori, he who offends in a Præmunire shall be said to offend Contra Coronam & dignitatem Regiam: And this in effect answers to all the aforesaid Objections; but yet other particular answers shall be given to every of them.

As to the third, although the Court by force of high Commission is the Court of the King, yet their proceedings are Ecclesiastical: And for this, if they usurp upon the temporal Law, this is the same offence which was before the said act 10 Eliz. For this was the end of all the ancient acts, that the temporal Law shall not in any manner be emblemished by any Ecclesiastical proceedings,

As to the fourth, although it be a new Court, yet the ancient Statutes extend to it within this word Alibi, and divers new Bishopricks were erected in the time of H. 8. And yet there was never any question, but that the ancient Acts of Præmunire extended to them.

But to answer to all the Objections aforesaid, founded upon the said Statute of 1 Eliz. out of the words and meaning of the same act; For whereas the act 1 Eliz. repealed the Statute 1 & 2 P. M. 8. There is an express Proviso in the said act 1 Eliz. that that shall not extend to repeal any clause, matter, or sentence contained or specified in the 1, & 2. P. M. which in any sort toucheth or concerneth any matter or cause of Præmunire: But that all of that which doth touch or concern any matter of Præmunire shall stand in force and effect: And the clause of 1. & 2. P. M. which concerns matter of Præmunire, is such, every person who by any process out of any Ecclesiastical Court of the Realm, or out of it, or by pretence of any Spiritual Jurisdiction, or otherwise, contrary to the Laws of the Land, unquiet or molest any man for any thing, parcel of the possession of any Religious house, shall incur the danger of the act of Præmunire, An. 16. R. 2. which proves that as well the act 1, & 2. P. M. as the act 1 Eliz. which creates the high Commission Court, which refers to the act of 1, & 2. P. M. intends by express words, that the act 16 R. 2. of Præmunire shall stand in force, Also the act of 1 Eliz. revives the act of 25 H. 8. cap. 10. which makes a Præmunire in a Dean and Chapter &c. for not electing, nor certifying, or not admitting of any Bishop elected: by which it is directly proved, that the act 1 Eliz. never intended to take away the offence of præmunire, but expressly

provided

provided for it, as appears by that which hath been said.

But then we are to note in what cases a Præmunire lies, in what not. Prima Regula

And for this that it is so penal, it is necessary that it should be explained and made known.

In all Cases, when the Cause originally belongs to the Cognizance of the Ecclesiastical Court, and Suit is prosecuted there, in the same nature as the Cognizance belongs to them (although in truth the cause, all circumstances being disclosed, belongs to the Court of the King, and to be determined by the Common Law) yet no Præmunire lies in that case, but a Prohibition. As if Tythes are severed from the nine parts, and are carried away: if the Parson sue for the subtraction of these Tythes in the Spiritual Court, this is not in the case of Præmunire; for it may be that the Plaintiff did not know that they were severed from the nine parts, nor that they were carried away; Nor may the Ecclesiastical Judg know any thing of it: And although that the Defendant plead this, yet the Ecclesiastical Court may proceed to try the truth of it without danger, vide 10 H. 4. 2. according with this opinion; so if a Parson sue for Tithes of Wood, surmising that they were Sylvæ cæduæ, under the age of twenty years, whereas in truth they were above the age of twenty years (in which case by the Statute of 45 Ed. 3. Tithes ought not to be paid:) yet a Prohibition lieth and no Præmunire. Regula Prima

But although that the cause originally may appertain to that Cognizance of the Ecclesiastical Judg, yet if he sue for it in the nature of a Suit, which doth not belong to the Ecclesiastical Court, but to the Common law, there a Præmunire lieth, as in the case put before: If the Parson after the severing of Tithes, will in any Ecclesiastical Court within this Realm, sue for carrying away his Tithes severed from the nine parts, which action by matter apparent to the Ecclesiastical Court, appertains to the Common Law; In such both the Actor and the Judge incurs the danger of a Præmunire; And so was it adjudged in 17 H. 8. as Spilman reports it: One Turbervile sued a Præmunire against a Parson, who by citation convened him into the Ecclesiastical Court within this Realm, & there Libell'd against him for taking of Tithes, which were severed from the nine parts, and the Parson was condemned and had Judgment that he should be out of the protection of the King, and forfeit all his Lands, Goods, and Chattels, and his body to perpetual Imprisonment, & damages to the party. So if a Moytuary be delivered to a Parson, and after the party re-take it, if the Parson sue for this as for a Moytuary to him delivered and carried away, he is in case of Præmunire; but after the repriſal, if he sue for it as Moytuary not executed, in nature of a Suit, which belongs to Court Christian: upon the truth of the case there is cause of Prohibition, and no Præmunire lies, vide 10 H. 4. 2. So the case which hath been put of suit for tithes of Wood, if the Parson sue for tithes of wood above 20. years growth, so that it appears by the Libel, that the Cognizance of this case doth not belong to Court Christian (viz.) to the Court of the Arch-bishop of Canterbury, the Præmunire lies, as you may see in the Book of Entries, tit. Dismes, fol. 221. But the tit. Prohibition, fol. 449. Divisione Dismes, pl. 2, 3, 4, 5. & 6. if the Suit be Pro sylva cædua, &c. So that as the Suit is framed the Cognizance belongs to Court Christian, although that the truth be otherwise, there a Prohibition lies, and no Præmunire. For when the cause originally belongs to the Cognizance of the Ecclesiastical Court, although that hold plea of any incident to Regula secunda.

it,

it, which belongs to the Common Law, there Prohibition and not Præmunire.

Regula tertia.

When the cause originally belongs to the cognizance of the common Law, and not to the Ecclesiastical Court, there although they libel for it according to the course of the Ecclesiastical Law, yet the Præmunire lyeth, for this, that this draws the cause which is determinable at the common Law, Ad aliud examen, viz. to be decided by the Civil or Ecclesiastical Law, and so deprives the Subject of the benefit of the common Law, which is his birthright: And with this agrees the Book of Entries, Title Premunire, fol. 229. b. & 430 a. where it is put for a Rule. Quod placita, Querelæ, & possessiones terrarum & tenementorum transgr. debitorum & aliorum consimilium infra Regnum Angliæ illat. ad dominum Regem ad Regalem Coronam & dignitates suas specialiter, & non ad forum Ecclesiasticum, pertinent. Quidam I. R. &c. machinans Dominum Regem & Coronam & dignitates suas exhæredare, & cognitionem quæ ad Curiam Domini Regis pertinent, ad aliud examen infra Regnum suum Angliæ in Curam Christianitatis coram V. W. Official. &c. trahere &c. quendam articulum ad prosequendum ipsum R. in eadem Curia Christianitatis coram præfato Officiali pro debito 20 l. & ipsum R. in eadem Curia præfato I. A. inde responsum citari, &c. So that if the original cause be temporal, although that they proceed by Citation, Libel, &c. in Ecclesiastical manner, yet this is in danger of Præmunire; And the reason of this Offence is expressed in the Writ, for this, that he endeavors to draw Cognitionem quæ ad Curiam Domini regis pertinet ad aliud examen, which is as much as to say, that the Debt, the Cognizance whereof belongs to the Court of the King, and to be determined by the common Law, he intends by the Original Suit to draw it to be determined by the Ecclesiastical Law.

And note, in the indictment of Præmunire against Cardinal Wolsey Mich. 21 H. 8. it is said, Quod prædictus Cardinalis & intend: finaliter antiquissimas Angliæ leges penitus subvertere & enervare, universumque hoc Regnum Angliæ & ejusdem Angliæ populum, legibus imperialibus vulgo dictis legibus Civilibus & eorum legum Canonibus in perpetuum subjugare & subjicere, &c. and this is included within these words, Ad aliud examen trahere, viz. to decide that by the Civil and Ecclesiastical Laws, which is determinable by the common Law: And upon this was a notable case in Hil. an. 25 H. 8. the case of Nick Bishop of Norwich, against whom, he then being in the custody of the Marshalsey, the Kings Attorney preferred a Bill of Præmunire. And the matter of the Præmunire was such. Within Thetford in the County of Norfolk hath been De tempore cujus, &c. such custome, that all Ecclesiastical causes arising within that Town, should be determined before the Dean of the same Town, who hath within it peculiar Jurisdiction; and that none of the same Town shall be drawn in plea in any other Court Christian for Ecclesiasticall causes, unless before the same Dean: And if any be against the said Custome drawn in Suit before any other Ecclesiastical Judge, and this be presented before the Major of the same Town, that such party shall forfeit 6s. 8d. And that an inhabitant of Thetford sued in the Consistory Court of the said Bishop, at Norwich for an Ecclesiastical cause arising within the said Town of Thetford, and this was presented before the Major of Thetford according to the Custom, for which he forfeited 6s. 8 d. the said Bishop cited the said Major to appear before him at his house in Hoxin, in Suffolk, generally Pro salute animæ, and upon appearance libelled, Per parole upon all the matter

matter, and enjoyned him upon pain of Excommunication to annul the said Presentment before a day: And upon a Premunire brought forth for this matter the said Bishop had Council learned assigned him: And they objected, that as well the said Presentment as the said Custom were for divers causes void, and therefore it cannot be said, Contra coronam & dignitatem Regiam, nor hath the Bishop drawn the party Ad aliud examen. for it ought not to be examined in any Court.

2. They objected, that the Court of the Bishop was not intended within the act of 16 R. 2. 32. but In Curia Romana aut alibi, and this alibi ought not to be intended out of the Realm, but it was resolved by Fitz-James chief Justice, & per totam curiam; That, be the Custom and Presentment good or not, this is a temporal thing and determinable by the common Law, and not examinable in the Spiritual Court; and for this, the Bishop in this case hath incurred a Premunire.

3. That Alibi extends as well to the Courts of the Bishops, and other Ecclesiastical Courts within this Realm, as elsewhere: And so the Court said, that it had been often times adjudged, upon which the said Bishop (the matter of the Indictment being true) confessed the said Indictment: And upon this appearing, the secondary Justice gave Judgment against him, that the said Bishop shall be out of the protection of the King, and that his Lands, Goods, and Chattels should be forfeited to the King, and his body to be imprisoned Ad voluntatem Regis &c.

Nicholas Fuller's *Case.*

IN the great case of Nicholas Fuller of Grayes Inn, these points were resolved upon conference had with all the Justices and Barons of the Exchequer. Ecclesiastical Commission.

1. That no Consultation can be granted out of the Term, for this, that it is an award of the Court, and is final, and cannot be granted by all the Judges out of the Term, nor by any of them within the Term out of Court: And the name of the Writ, Viz. a Writ of Consultation, imports this, that the Court upon consultation amongst them ought to award it.

2, That the construction of the Statute, 1 Eliz cap. 1. and of the Letters Patents of high Commission in Ecclesiastical causes founded upon the said Act, belongs to the Judges of the Common Law: For although that the causes, the cognizance of which belongs to them, are merely spiritual, and the Law by which they proceed is merely Spiritual, yet their authority and power is given to them by Act of Parliament, and Letters Patents: the construction of which belongs to temporal Judges: And for this, the consultation which was granted is with this restraint, Quatenus non agat de authoritate & validitate literarum patentium pro causis Ecclesiasticis vobis vel aliquibus vestrum direct. aut de expositione & interpretatione statuti de anno primo nuper Reginæ, &c. In the same manner as if the King hath a Benefice donative by Letters Patents, although that the Function and Office of the Incumbent be Spiritual, yet inasmuch as he comes to it meerly by Letters Patents of the King, he shall not be visitable nor deprivable by any Ecclesiastical authority, but by the chancellor of the King or by commissioners under the great Seal.

3. It was resolved when there is any question concerning what power or jurisdiction belongs to Ecclesiastical Judges, in any particular case, the determination of this belongs to the Judges, of the common Law; in what cases they have cognizance, and in what not; for if the

Eccleſiaſtical Judges ſhall have the determination of what things they ſhall have cognizance, and that all that appertains to their Juriſdiction which they ſhall allow to themſelves, they will make no difficulty, Ampliare juriſdictionem ſuam: And according to this reſolution, Bracton Lib 5. tract. de except. cap. 15. fol. 412. Cum judex Eccleſiaſticus prohibitionem a Rege ſuſcepit, ſuperſedere debet in omni caſu, ſaltem donec conſtiterit in Curia Regia ad quam pertinet juriſdictionem; quia ſi Judex eccleſiaſticus æſtimare debet an ſua eſſet juriſdictio, in omni caſu indifferenter procederet, non obſtanti Regia prohibitione, vide Entries. fol. 445. There was a Queſtion, whether Court Chriſtian ſhould have cognizance of a Lamp. And a Prohibition was granted, Quod non procedant in curia Chriſtianitatis, quouſque in curia noſtra diſcuſſum fuerit, utrum cognitio placiti illius ad Curiam noſtram vel ad forum Eccleſiaſticum pertineat. And if the determination of a thing which appears to Court Chriſtian, doth appertain to the Judges of the common Law, the Judges of the common Law have power to grant a Prohibition. And all this appears in our Books. that the Judges of the common Law ſhall determine in what caſes the Eccleſiaſtical Judges have power to puniſh any Pro læſione fidei, 2. H. 4. fol. 10, 11. H. 4. 88. 22 Ed. 4. 20 So of the bounds of Pariſhes in 5 H. 5. 10. 39 Ed. 3. 23. So it belongs to the Judges of the common Law, to decide who ought to certifie excommunication, and to reject the certificate, when the Ordinary or Commiſſary is party, 5 Ed. 3. 88. Ed. 3. 69. 70. 18 Ed. 3. 58. 12 Ed. 4. 9 H. 7. 1. 10 H. 7. 9. For this it was reſolved clearly, that if any perſon ſlander the authority or power of the high Commiſſioners, this is to be puniſhed before the Judges of the common Law, for that the determination of their authority and power which is given to them, by the Statute, and the Letters Patents of the King, belongs to them, and not Court Chriſtian: And for this, that the many Articles objected againſt Fuller concerning the ſlander of their authority and power, was ſolely determinable and puniſhable before the Judges of the common Law. One other reſtraint was added in the Conſultation: Et quarenus non agat de aliquibus ſcandalis, contemptibus, ſeu aliis rebus quæ ad communem legem aut ſtatuta regni noſtri Angliæ ſunt punienda & determinanda.

4. It was reſolved, That if a Counſellor at Law, in his argument ſhall ſcandal the King or his Government, Temporal or Eccleſiaſtical, this is a Miſ-demeanor and contempt to the Court; for this he is to be indicted, fined, and impriſoned, and not in Court Chriſtian: But if he publiſh any Hereſie, Schiſm, or erroneous Opinion in Religion, he may be for this convented before the Eccleſiaſtical Judges, and there corrected according to the Eccleſiaſtical Law; For the Rule is, Quod non eſt jure conſonum quod quis pro aliis quæ in Curiis noſtris acta ſunt, quorum cognitio ad nos pertinet, trahatur in placitum in Curia Chriſtianitatis, as it appears in the Book of Entries, fol. 448. So that the intent is, that Hereſie, Schiſm, or ſuch enormous opinions in Religion, doth not appertain to the Cognizance of temporal Courts: For this cauſe a conſultation was granted, Quoad ſchiſmata, hæreſes, & inormiam, impiam vel pernitioſam opinionem in religione, fide, ſeu doctrina Chriſtiana pie & ſalubriter ſtabilita infra regnum noſtrum Angliæ, quorum cognitio ad forum eccleſiaſticum ſpectat, &c. Vide Mich. 18 H. 8. Rot. 78. In Banco Regis. The caſe was, that a Leet was held die Jovis poſt feſtum Sancti Mich. Arch. 17 H. 8. of the Prior of the houſe of St. John de Bethlehem de Sheine, of his Manor of Leviſham in the County of Surrey, before John Beare the Steward there, a grand Jury was charged to inquire for the King of all offences inquirable within the ſaid Leet, where one Philip Aldwin, who was a Reſident within the ſaid Leet, appeared at the ſaid Leet, Idemque Philippus ſciens quandam Margaretam, uxorem Johannis Aldwin apud Eaſt Greenwich, infra juriſdictionem Letæ prædictæ, pluries perantea corpus ſuum

ſuum in adulterio vicioſe exercuiſſe, ac volens ipſam Margaretam pro republica in exemplum taliter offendere volentium legitime punire, ad dictam magnam juratam ſe perſonaliter exhibuit & eiſdem ſic juratis de dicta mala & vicioſa vita præfatæ Margaretæ inſtructionem & informationem veraciter dedit. Upon which the ſaid Margaret did draw the ſaid Philip into the Court of the Arch-biſhop of Canterbury, and there did Libel againſt him for Defamation of Adultery; And that the ſaid Philip ſaid in hiſce Anglicanis verbis; Margaret Allen is a Whore and a Bawd, and it is not yet three weeks agon ſince a man might take a Prieſt betwixt her legs; which Engliſh words were parcel of the words by which he informed the grand Inqueſt at the ſaid Leet: And upon this he had by award of the Court a Prohibition, by which Writ it appears, Quod per leges hujus Regni Angliæ omnes & ſinguli quicunque Domini Regis ſubditi coram quibuſcunque ipſius Domini Regis Juſticiariis ſeu quocunq; alio viro judiciali officio ſeculari fungente, in aliquam juratam patriæ jurati vel ad aliquas inſtructiones ſeu informationis alicui hujuſmodi jurat, in evidentias dandas comparentes & evidentias dantes, ab omni impetitione & calumnia in aliqua Curia Chriſtianitatis propterea fienda, quieti & liberi eſſe debent & in perpetuum penitus irreprehen. And by this Record it appears, and by the Stat. of 10 Ed. 3. c. 11. by which it is provided, that Indictors of Lay-people or Clerks in Turneys, and after delivering them before Juſtices ſhall not be ſued for defamation in Court Chriſtian, but that the Plaintiff who finds himſelf grieved ſhall have a Prohibition formed in the Chancery upon his caſe, which was but an affirmance of the Common Law, for the Statute provides only for indictors in the Turney only: And yet as well all indictors in other Courts, and all witneſſes, and all others who have affairs in the Temporal Courts, ſhall not be ſued or moleſted in Court Chriſtian, vide Paſch. 6 Eliz. in the Reports of the Lord Dyer (which caſe is not printed) John Halles in the caſe of marriage, between the Earl of Hereford, and the Lady Katherine Gray, declared his opinion againſt the ſentence given by Commiſſioners Delegates of the Quæn, in a cauſe Eccleſiaſtical, under the Great Seal: And that the ſaid Sentence in diſ-affirmance of the ſaid marriage was unjuſt, wicked, and void, and that he thought that the ſaid Judges Delegates had done againſt their conſcience, and could not render any reaſon for the ſaid ſentence; And what Offence this was, was referred to divers Judges to conſider, by whom upon great deliberation it was reſolved, that this offence was a contempt as well againſt the Quæn, as to the Judges; and every of them were puniſhable by the common Law, by fine and impriſonment: And that the Queen may upon that ſue for it in what Court ſhe ſhall pleaſe: for the ſlander of a Judge in point of his Judgment, be it true or falſe, is not juſtifiable, &c. And all this appears by the report of the Lord Dyer, ſo that in the ſaid conſultation it was well provided, that the high Commiſſioners ſhould not intermeddle with any ſcandal by the common Law.

5. It was reſolved, that when any Libel in Eccleſiaſtical Court contains many Articles, if any of them do not belong to the cognizance of Court Chriſtian, a Prohibition may be generally granted; and upon motion made, conſultation may be made as to things which do belong to the Spiritual Juriſdiction: for the Writ of conſultation with a Quoad, is frequent and uſual, but a Prohibition with a Quoad, is Rara avis in terris nigroque ſimillima Cygno. And for theſe reaſons it was reſolved by all, that the Prohibition in the caſe at the Bar was well granted, which in truth was granted by Fenner and Crook Juſtices, in the time of the Vacation.

Note, theſe general Rules concerning Prohibition, quæ ſparſim inveniantur in libris noſtris.

Articuli Cleri c. 8. Non debet dici tendere in præjudicium Ecclesiasticæ libertatis quod pro Rege & Repub. necessarium videtur.

Entries 444. 44. 7. Non est juri consonum, quod quis super iis quorum cognitio ad nos pertinet in Curia Christianitatis trahatur in placitum.

Circumspecte agatis, &c. Episcopus teneat placitum in Curia Christianitatis de iis quæ mere sunt spiritualia.

West. 2. cap. 43. Prohibeatur de cætero Hospitalariis & Templariis ne de cætero trahant aliquem in placitum coram Conservatoribus privilegiorum de aliqua re, cujus cognitio ad foram spectat Regium.

Ibidem. Non concedantur citationes priusquam exprimatur super qua re fieri debet citatio.

The knowledg of all cases Testamentary, Matrimony, &c. by the goodness of the Princes, and by the Laws and Customs of the Realm appertain to spiritual Jurisdiction.

6. It was resolved, that this especial consultation, being only for Heresie, Schism, and erroneous Opinions, &c. That if they convict Fuller of Heresie, Schism, or erroneous Opinion, &c. that if he recant the said Heresie, Schism, or erroneous Opinion, that he shall never be punished by Ecclesiastical Law: And after the said consultation granted, the said Commissioners proceeded and convicted Fuller of Schism and erroneous Opinions, and imprisoned him and fined him two hundred pounds: And after in the same Term, Fuller by his Council moved the Court of Kings Bench to have a Habeas Corpus, & ei conceditur, upon which Writ the Goaler did return the cause of his detention.

Mich. 5. Jac. Regis.

First-fruits, Acts and Monuments, 351. & 352. NOte, Annates, Primitiæ, and first Fruits, are all one; It was the value of every spiritual Living by the year, which the Pope, claiming the disposition of all Ecclesiastical Livings within Christendom, reserved out of every Living; and those, and Imprpriations began about the time that Polydore Virgil, lib. 8. cap. 2. saith Nullum inventum majores Romano Pontifici cumulavit opes quam id quod annuatam vocant, qui usus omnino multo antiquior est quam recentiores scriptores suspicantur, & annates more suo appellant primos fructus unius anni: vide Concilium Viennense quod Clemens Quintus indixit pro annatibus.

These First-fruits were given to the Crown by 26 H. 8. cap. 3.

Note, Hil. 34. Ed. 1. An. 1370. At a Parliament held at Carlile, great complaint was made of intolerable oppressions of Churches and Monasteries by William Testa (called Mala Testa) and the Legate of the Pope, and principally concerning First-fruits, at which Parliament the King by the assent of his Barons denied the payment of First-fruits of Spiritual Promotions within England, which were founded by his Progenitors and the Nobles, and others of the Realm, for the service of God, Alms, and Hospitality; And to this effect he writ to the Pope, and thereupon the Pope relinquished his demand of First-fruits of Abbys, in which Parliament the First-fruits for two years were granted to the King.

Decimæ

Decimæ, id est, the Tenths of Spiritualties were perpetual, which in ancient times were paid to the Pope, until Pope Urbane gave them to R. 2. to aid him against Charles King of France, and others who supported Clement the seventh against him. Tenths perpetual.

And 5 H. 3. by the Bulls of the Pope, the Church of England began to pay the Tenths of all their Revenue, as well Spiritual as Temporal to H. 3. for years, These were given to the King by the said act of 26. H. 8. cap. 6. Acts and Monuments, 335. 336. an. Dom. 1266.

Vide Lambert de Priſt. Anglorum, &c. fol. 128. cap. 10. omnes qui habuerint 30. denar. vivæ pecuniæ in domo ſui, de ſuo proprio, Anglorum lege dabit denarium Sancto Petro, vide ib. inter leges Inæ. fol. 78. cap. 4. Peter-pence.

Lambert ib. expoſitione verbi, Monies and Peter-pence; Ina King of the West Saxons granted it to the Pope when he was in pilgrimage at Rome, Cambd. Brit. pag. 306. saith, that it was Offa the West Saxon King that did grant it: Quære.

Sir Anthony Ropers *Case.*

IN the case of Sir Anthony Roper, who was drawn before the high Commissioners at the Suit of one Bulbrook the Vicar of Bentley, for a Pension out of a Rectory Impropriate, of which Sir Anthony was seised in fee: And the high Commissioners sentenced the said Sir Anthony to pay that, which he refused; and upon this they committed him to Prison, who in this Term by Habeas Corpus appeared in Court, upon the return of which Writ the matter did appear: And it was well debated by the Justices, and was resolved, that the said Commissioners had not authority or commission in the said case, for when the acts of the 27 H. 8. & 31 H. 8. of Monasteries had made Parsonages Impropriate, and other Religious Possessions Lay-fee, although that Pensions were saved, yet as it appears by the Preamble of the act of 34 H. 8. cap. 16. those to whom the Pensions appertain, had not remedy for the said Pensions, &c. And for this there it is provided, that if the Farmer or Occupier of such Possessions shall wilfully deny the payment of any such Pensions, Portions, Corrodies, Indempnities, Synod Priories, or any other Profits, whereof any Arch-bishop, Bishop, Arch-deacon, or any other Ecclesiastical person were in possession at, or within ten years next before the time of such dissolution of any such Monastery, &c. that then it shall be lawful for the said Arch-bishop, Bishop, or other Ecclesiastical person aforesaid, being so denied to be satisfied and paid thereof: And having right to the thing in demand, to have such process, as well against every such person or persons, as so shall deny payment, &c. as against the Church and Churches charged with the same, as heretofore they have lawfully done, and as by, and according to the Laws of this Realm they may now lawfully do, &c. And if the King hath covenanted to discharge the Patentee, &c. of Pensions, and then suit shall be made for the same in the Court of Augmentations, and not elsewhere; then if the high Commissioners will determine of Pensions, they ought to do it by the act 34 H. 8. and the said act gives this expressly to Ordinaries, and their Officials, and the high Commissioners have their authority by the act 1 Eliz. made a long time after.

But it was objected, that the said act 1 Eliz. gave to the Quæn, her Heirs and Successors, power to assign Commissioners to exercise and execute

execute all manner of Jurisdiction Spiritual, to visit, reform, &c. all Schism and Heresie, &c. and Enormities which by any manner of Spiritual Jurisdiction can, or lawfully may be reformed. And it was said, that such Spiritual Jurisdiction which the Bishop should have, is transferred to the high Commissioners.

But it was unanimously resolved by Coke, Walmsley, Warberton, Daniel and Foster, Justices, that the Act 1 Eliz. doth not extend to this case for divers causes, viz.

1. For that the said clause of Resignation is not more large then the clause of Restitution; and that the Act of 1 Eliz. doth not take away nor alter any Act of Parliament, unless those only which are expressly named in the Act: And it was resolved that the high Commissioners cannot hold plea for the double value of Tythes carried away before severance, for two causes.

(1.) For this, that the Statute 2 Ed. 6. cap. 13. gave the Cognizance of it to Spiritual Judges, which is to be intended of such Spiritual Judges who then were.

(2.) Substraction of Tithes is injury and no crime, but concerns interest and property: And for this the high Commissioners cannot meddle with it,

2. For that the words of the Act 1 Eliz. are (which by any manner of Spiritual Jurisdiction can or lawfully may be reformed) And it appears that these words extend to the crime only, and not to the cases of Interest betwixt party and party; for the words are: All such Errors, Heresies, &c. which by any manner, &c. so that (such) and (which) are Relatives.

3. This Jurisdiction was given to the Bishops by Act of Parliament, viz. by 34 H. 8. which is more temporal than spiritual: And for this out of the precedent words 1 Eliz. viz. Spiritual or Ecclesiastical Jurisdiction, which is to be intended of Jurisdictions meerly or purely Spiritual, but Acts of Parliament are more temporal than spiritual.

4. It was not the intent of the Act 1 Eliz. which revived the Statute 23 H. 8. cap. 9. by which Act it is enacted, that none shall be sued out of his Dioces, &c. that the high Commissioners for private causes shall send for Subjects out of any part of the Realm, and so in effect confound the Jurisdiction of the Ordinary who is an officer and Minister so necessary that in divers causes the Courts of the King cannot administer to Subjects without him, &c.

5. If the Act of 1 Eliz. had extended to give to high Commissioners power to determine meum & tuum, as Pensions, Tithes, Legacies, Matrimonies, Divorces, Administrations, Probates of Testaments, &c. the Act would also give the party grieved benefit of appeal, and not give absolute authority to the high Commissioners finally to determine Meum & tuum, and to bastardise Issues, &c. without any controlement, for this should be dissolved in the Court of the Ordinary which is so antient and inevitably necessary in many cases to the administration of Justice, in divers points of it, that without this, Justice cannot be executed.

6. The high Commissioners cannot extend themselves but only to Crimes, for the clause which gives to them power to imprison, &c. and to punish, &c. and imprison such Offender, &c. And (Offender) is only to be intended of him who commits any crime, and not of him who detains Pension, Legacy, Tythes, &c.

Mich. Jac. Rot. 2254.

PRæceptum fuit Guardiano prisonæ Domini Regis de Fleet. Quod haberet hic; viz. apud Westmonasterium immediate post receptionem hujus brevis corpus Anthonii Roper militis in prisona prædicta sub custodia sua detenti quocunque nomine censeretur, una cum die & causa captionis & detentionis ejusdem Anthonii: Et iidem Justiciarii hic, visa causa illa, ulterius fieri fecerint quod de jure & secundum legem & consuetudinem regni Domini Regis Angliæ fuerit faciendum: Et modo hic ad hunc diem, scilicet diem Sabbati proximum post octabis Sancti Mich. isto eodem termino venit prædictus Anthonius in propria persona sua sub Custodia prædicti Guardiani ad barram, hic prædict. & idem Guardianus, tunc hic mand. Quod ante adventum brevis predicti, viz. nono die octabis ultimo præterito prædictus Anthonius Roper miles reducit se prisonæ prædictæ perantea commissus virtute cujusdem warranti, dati 30. die Junii ultimo præterit, quod sequitur in hæc verba, viz.

Hab. Corpus retorn. and discharge by judgment of the Court.

THese are in his Majesties name to require and charge you, by vertue of his high Commission for causes Ecclesiastical, under the great Seal of England, to us and others directed, that herewith you receive and take into your Custody the body of Sir Anthony Roper, Knight, and him safely detain Prisoner at this our commandment, until we shall give order for his enlargement, signifying unto you, that the cause of his commitment is, for that there being a certain cause referred unto us by his Majesties special direction, betwixt him the said Sir Anthony Roper and John Bulbrook Vicar of Bentley, for that he detained wrongfully from him the said Vicar, a certain yearly Pension due unto him from the said Sir Anthony; And being thereupon called before us, and after full hearing of the cause in the presence of Sir Anthony and his Council at three or four several times, and at the last adjudged by us to pay the said Pension, he having some time of deliberation given unto him by us to consider thereof, hath notwithstanding obstinately disobeyed the said Order, and doth so still persist: And this shall be your Warrant in that behalf; Given at Lambeth this thirtieth of June, 1607. Et quod hæc fuit Causa Captionis & detentionis, predicti Anthonii in prisona prædicta, corpus tamen prædicti Anthonii modo hic paratus habet prout per breve prædictum sibi præceptum fuit, &c. super quo, visis præmissis & per Justiciarios hic plenius examinatis & intellectis, videtur iisdem Justic. hic quod prædicta Causa commissionis prædicti Anthonii prisonæ de Fleet prædict. in retorno prædict: superius specificata minus sufficiens in lege existit ad detinendum prædictum Anthonium in prisona prædict. Ideo prædictus Anthonius à prisona prædicta per Curiam hic demittitur, ac idem Guardianus de hujusmodi Custodia per eandem curiam hic plene exoneretur &c. And this was resolved una voce by Coke chief Justice, Walmsly. Warberton, Daniel, and Foster Justices, for the causes and reasons afore expressed.

And in the very same Term in Lanes case, a Parson in Norfolk who sued one of his Parishoners before the high Commissioners, for scandaling of him, saying in the Church on the Sabbath before all his Parishoners, That he was a wicked man, and an arrant Knave: Prohibition lies, for this, that it was not so enormous as the Statute intended: Note, that by express Proviso, the high Commissioners cannot intermeddle with all Heresies, but with exorbitant Heresies, &c. and the other shall be determined before the Ordinary.

Hil.

Hill. 5: Jac.

Justice of *Wales* cannot be by Commission but by Patent.

NOte, it was moved to the Justices this very Term, upon consideration of the acts of 34 H.8. cap. 28. and the 18 Eliz. If the Justices in Wales may be constituted by Commission; and upon conference it was conceived they could not, but that it ought to be by Patent, as it hath been used ever since the act 34 H.8. Then it was moved, if the King which now is, may by force of a clause of 34 H. 8. do it, which clause is, That the Kings most Royal Majesty shall and may at all times hereafter from time to time, change, add, order, alter, minish, and reform all manner of things before rehearsed, as to his most Excellent wisdom and discretion shall seem meet: And also to make Laws and Ordinances for the Common-wealth, and good quiet of his said Dominion of Wales, and his Subjects of the same, from time to time, at his Majesties pleasure. And it seemed to divers of the Justices, that this power given to the King determined by his death, for divers causes.

1. It wants these words, His Successors, and for this it ought to be drawn in succession by construction, and that should be against the intention of the makers of the act, for they gave this high power of alteration, &c. of the Laws to the Kings most excellent Majesty, as to his most excellent wisdom and discretion shall be thought most meet; which words want, His Successors: For as his wisdom and discretion, which they well knew, did not go in succession, so the power and great confidence which was annexed to them did not go in succession; and for this, that Eorum progressus ostendunt multa quæ ab initio provideri non possunt: And what ensues upon this Act of the 34 H.8. concerning this uniting of Wales and England, and the subjection of them to the Laws of England, none could divine: For this cause it was thought reasonable that King H.8. during his time, might alter them; that he seing the obedience of those of Wales, and the good fruit which proceeded out of the said Act, never altered any part of it: But it was never the intention of the said Act to give power to the King and his Successors for ever, to alter, &c. the Laws, so that none of that Country could be certain of his Life, Lands, Goods or liberty, or any thing which he hath, and that would be of great servitude, Misera servitus est, ubi jus est vagum: Also the words are for the Common-wealth, &c. if his Majesties Subjects of Wales, at his Majesties pleasure, &c. by which it appears that the intention of the makers of the Act, was to give this power to King H.8. for his pleasure, did determine by his death.

2. Power of alteration of Laws, &c. is a point of high confidence concerning the administration of Justice, which the act by omitting [of his Successors] intended to unite this confidence to the person of H.8. and not to extend it without limitation of time to his Successors: And this stands with the construction of Law in other cases, for all Commissions concerning the administration of Justice, determine by the death of the King, yea he constitutes them Justiciarios suos, which authority being in case of Administration of Justice determines by the death of the King, or resignation, 1 Ed.5.1. 1 H.7.1. 14 Ed.4.44. yet if the King make a Lease Durante bene placito, or present one to a Church, these are not void by his death, until, they are controlled or revoked by his Successor: But the Office of a Sherif which is granted, Durante bene placito, determines by the death of the King, for this concerns the administration of Justice: And upon certificate of the opinion of the Justices, that the Justices of Wales cannot be constituted by commission to the Lord Chancellor, Baron Snigg had a Patent for the circuit of Wales, as others had before.

Trin.

Trin. 6. Jac.

THis Term it was resolved Per totam Curiam in Communi banco, viz. Coke chief Justice, Walmsley, Warberton, Daniel, and Foster, in the case of Alan Ball, that the high commissioners cannot by force of the Act, 1 Eliz. cap. 1. send a Pursivant to arrest any person subject to their Jurisdiction, to answer to any matter before them: But they ought to proceed according to Ecclesiastical Law, by citation: For the Statute 1 Eliz. did not give them any such Authority to arrest the body of any Subject upon surmise: And although that it be comprised within their Commission, that they may send for any by Pursivant, &c. yet inasmuch as this hath no foundation upon the act of 1 Eliz. the King by his commission cannot alter the Ecclesiastical Law, nor the proceedings of it, for the Act says, that the Commissioners shall exercise, use, and execute all the Premisses (according to the privilege of the Act) according to the said Letters Patents, id est, the Letters Patents which are mentioned and authority before, for this is imployed within this word (said) and for this without Question, the Commission only without the Act cannot alter the proceedings of the Ecclesiastical Law: And in the Circuit of Northampton, when the Lord Anderson and Glanvil were Justices of Assise, a Pursivant was sent by the Commissioners to arrest the body of a man to appear before them, and in resistance of the arrest, and striving amongst them, the Pursivant was killed: And if this was Murther or not, was doubted, and this depended upon the validity of power and authority of the Pursivant, for if this Authority was lawful, then in killing of an Officer of Justice in execution of his Office, is murther; And advisement was taken till the next Assises: and upon conference at the next Assise it was resolved, that the arrest was Tortius, and by consequence that this was not murther: But they may send Citation by a Pursivant, and proceed, if the party made default, to excommunication, and then to have a Capias excommunicatum, and to imprison him by the Writ of the King, which Writ De excommunicato capiendo, is preserved and retornable by the Statute of 5 Eliz. which shall be in vain, if they may arrest him by a Pursivant before any answer or default made: And this will be against the Statute of Magna charta, and all the ancient Statutes, which see Restal, Title Accusation: If a free-man shall be arrested upon a bare surmise or accusation: which Statutes if good and profitable for the Weal-publike, never were intended to be repealed by the said Statute of 1 Eliz.

High Commission. Pursivant.

Simpsons Case. before the Judges of Assise in *Northamptonshire.* 42. *Elizabeth.*

Note, that neither the Star-Chamber nor Chancery awards any Messenger to arrest the Body until a contempt made, but first a Subpœna, &c.

Marmaduke Langdale's *Case*, *vi.* 58.

IN the case of Marmaduke Langdale of Leaventhorpe in the County of York, by Joane his Wife, being sued for maintenance before the Bishop of Canterbury, and other high commissioners: it was resolved Per totam Curiam, præter Walmsley who doubted of it, that a Prohibition, which before was

High Commission.

granted, was well maintainable, for this, that it was not any enemity, nor any Offence within the Statute but a neglect of his duty, and a breach of his vow of maintenance; also the party shall be defeated of his appeal: And for that reason it belongs to the Court of the Ordinary: And the Rule of the Court was, that the Plaintiff shall count against the high Commissioners (for against his Wife being one person in Law with him, he could not count) and upon demurrer joyned, the case to be argued and adjudged, upon which the party grieved may have a Writ of Error, Si sibi viderit expedire, &c. See more, fol. 58.

On Sunday last, my Lord chief Justice and my self, at Serjeants Inn in the after-noon, received by the hands of the Kings Attorney by commandment, as he signified to us by your Lordships, the said complaints, exhibited to his Majesty by the Lord President of Wales, and the Lord President of York, against the Judges of the Realm, with a signification of your Lordships pleasure, that we two should impart the same to the rest of our Brethren, which we did on Munday in the after-noon, the fore-noon being spent in the publick service of the Realm, at Westminster: And upon consideration had of parts of the complaint, we have, as this short time will give us leave, being daply imployed, as well in the Courts at Westminster, as some of us for tryalls of Writs of Nisi prius, resolved upon these answers, which we knowing to be Warranted by the Laws of this Realm, doubt not but will be allowed by your Lordships; And do hope that where the Judges of this Realm have been more often called before your Lordships, then in former times they have been, which is much observed, and gives much emboldning to the Vulgar, that after this day we shall not be so often (upon such complaints, your Lordships being truly informed of our proceedings) hereafter called before you.

And seeing that my Lord President of York hath now Ore tenus, first opened the cause of his grief more amply, and in some cases more particularly, I will begin to those objections that have been made on the behalf of that Council, wherein for method, and for avoiding of confusion, I will first speak to the true cause of the Institution of that Court.

2. That our proceedings in granting of Prohibitions, is for the matter justifiable by Law.

3. That the manner of our proceedings was respectful and comly towards the Lord President of York, and the Council there.

4. Answers to all objections both particular and general.

5. Remedies for the time past, if there be just cause.

6. And lastly, remedies for the future, to take away all the causes of opposition between the Judges and both the said Councils: viz.

After the suppression of all Religious houses, to the value of two hundred pound, or under, An. 27. H. 8. in the begining of October, An. 28 H. 8. there was a great insurrection of the Lord Hussey, and twenty thousand persons in Lincolnshire, about the cause of Religion, against whom Charles Brandon Duke of Suffolk went and appeased them.

As soon as they were appeased, a great Commotion began of 40000 men of that County, Sir Robert Ask being Chief, against whom the Duke of Norfolk went and dispersed them. Soon after in Lancashire began a great Rebellion of men of that County, and of Cumberland, Westmerland, and Northumberland, against whom the Earl of Derby was imployed, and quieted them: After that, Musgrave Tilby, and others, began to raise a great number, and assaulted Carlile Castle, whom the Duke of Norfolk overthrew.

Presently after Sir Francis Bigot with a multitude of people, made an Insurrection

Insurrection at Setrington, Leigh, Pickering, and Scarbrough in Yorkshire, whom the Duke of Norfolk pacified: And soon after the Lord Darcy, Ask, Constable, Bulmer, &c. began a new Commotion about Hull in Yorkshire, whom the Duke of Norfolk appeased. And all these Rebellions were betwæn the beginnings of 28, and 30. of H. 8. within which time many of the Rebels were executed in Furore belli, and in Flagranti crimine, by Marshall Law, and some attainted by the Common-Law. The King intending the suppression of the greater houses of Religion, which An. 31 H. 8. he effected, he established a Council there for the quiet of the Countries of Yorkshire, Northumberland, Westmerland, Cumberland, Duresme, the Counties of the City of York, Kingston upon Hull, and Newcastle upon Tine, for preventions of Riots, Tumults, and Insurrections in those Counties and places: In this time of necessity and danger, the King did arme the President and Council with two authorities in one Commission: the one a Commission of Oyer and Terminer, de quibuscunque congregationibus & conventiculis illicitis coadunationibus, conferationibus Lolardiis, imprisionibus falsis, allegatis, trangressionibus, Riotis, Routis, retentionibus, contemptibus, falsitatibus, mainutenentiis, oppressionibus, violentiis, extortionibus & aliis malefactis, offencis, & in juriis quibuscunque, per que pax & tranquilitas subditorum nostrorum Comitatibus, Civitatibus, & villis prædictis gravat, &c. Secundum legem & consuetudinem regni nostri Angliæ vel aliter secundum sanas discretiones vestras audiendum & terminandum.

The other authority was, Nec non quascunque actiones reales seu de libero tenemento, & personales; causasque debitorum & demandorum quorumcunq; in Com. &c. prædictis, quando ambæ partes vel altera pars sic gravata paupertate gravata fuerit quod commode Jus suum secundum legem Regni nostri aliter prosequi non possit, similiter secundum leges & consuetudines regni nostri Angliæ vel aliter secundum sanas discretiones vestras. And this is all the authority that the President and Council had first expressed in their Patents, without any private Instructions: and this appears by the Commission under the great Seal, 31 H. 8. 6 Pars. Roberto Landavensi Episcopo Præsidenti Concilii, & aliis; out of which Charter these things were observed, Viz.

1. That the final intention of the Commission was, Quod pax & tranquillitas subditorum præserventur.

2. That they hear and determine Riots, Routs, &c. according to Law, or their discretions, which authority by discretion was added, Ad faciendum populum: For it was resolved without Question, that in such cases they had not power but to proceed according to Law, for that is Summa discretio, and not according to their private conceits and affections, quia talis discretio discretionem confundit, so the other clause concerning real and personal Actions in all the Counties of York, Northumberland, Cumberland, Westmerland, Duresme, and the Towns aforesaid, was only Ad faciendum populum, for this was utterly void in Law. For,

1. No such general authority granted, may be made by the Commission of the King, to hear and determine all real actions within such a County according to Law, as he may by Charter within a certain County or particular place, for the King by Commission may give power to determine criminal causes between the King and the party, Secundum legem & consuetudinem Angliæ, but he cannot give power by Commission to determine causes between party and party: As it was resolved in Scrogg's case, An. 2 Eliz. fol. 175. in Dyer. vide Dyer. 236. But the King by his Letters Patents may grant to such a corporation in such a Town, Tenere placita realia, personalia, & mixta; And none by this can have any prejudice, for the proceeding ought to be according to Law; and if they erre, the party grived may have his Writ of Error: but the Court cannot grant to them a Court

of Equity for the cause aforesaid; And for this Cause, that such a Judge should be without controlement: And it was said, that if such Commissioners cannot determine Felonies, or other criminal causes by Writ, but by Commission, so cannot any determine private causes betwixt party and party by Commission but by Writ, by the Statute of Magna Charta, cap. 12, and West. 2. cap. 30. Recognitiones de nova disseisina, &c. non capiantur nisi in propriis Comitatibus: Which act gives authority to Justices of Assise in their proper Counties, by which it appears, that without an Act of Parliament, the King by his Letters Patents cannot put and authorise Justices De Assisas Capiendas, to take them within another County: And for this the ancient Presidents and proceedings of Law ought not to be altered. As a Justice of one Bench, or of the other, ought to be made by Commission, and not by Writ, and yet he may be discharged by Writ 5 Ed. 4. 32. But Justices in Eyre are by Writ, as it appears by Bracton, lib. 3. cap. 11. and Britton fol. 1. Also by the Statute of West 2. cap. 30. and of York cap. 4. Justices of Nisi prius, give judgment in Assises of Darrein presentment, and Quare impedit in such a County, which cannot be done without Parliament, Et sic de cæteris.

Also it was observed, that at the first the said Commission concerning actions between party and party, extended only when both the parties, or one of them were so poor, as they were not able to prosecute at Law: Also by the first Institution they had no power to grant Injunctions. And lastly, their Commission was Patent under the great Seal, and inrolled in Chancery: And thus much was said for the First, concerning the true cause of the Institution of the Court, Viz. For preventing of Tumults and Rebellions, and when it began.

2. As to the second point, the granting of Writs of Habeas Corpus, and Prohibitions, is justifiable by Law; for whereas at the first their authority was Patent, it is now private; for the Letters Patents do refer unto certain Instructions which are no where of Record, but kept in private, and it was feared, for private respects, Et de non apparentibus & non existentibus eadem est ratio: besides, the danger to the Subject is great, for if they lose their Instructions (as it hath hapned heretofore) all is Coram non judice: And this first reason is drawn from the Instructions themselves: The second reason is drawn from the contumacy of the party that supposeth himself to be grieved by the Prohibition, and against whom it is granted; if the authority of the Council be never so good, yet being late and particular Jurisdiction, the party must of necessity plead it, so as it may appear unto us judicially; for as we are Judges of Record, so must we be informed of Record, and never yet hath any party prohibited moved in Court to have a consultation, by which might be set forth the Jurisdiction of that Court and Council, so as the granting of Prohibitions hath been just; and the fault (if any be) in the parties themselves, that never hitherto made their cause known, as it ought to be by Law, to the Court.

The third reason is drawn from the great injury offered to the defendants, for it is a true Rule, Misera servitus ubi jus est vagum aut incertum: The Defendants by Law, may in all Courts plead to the Jurisdiction of the Court; but how can they do so, when no man can possibly know what Jurisdiction they have: concerning matters of State, which are Arcana imperii, it is meet they should be kept sub sigillo consilii, and in secret: but for Jurisdiction betwen party and party, for deciding of Meum & tuum, God forbid they should not be known to them who are to be judged by them; but the keeping of them in such secrecy betwaieth that the Council are afraid that they would not be justified if they were known: And it was con-

concluded again, Miſera ſervitus ubi jus aut vagum aut incertum.

3. But proceedings herein have been reſpectful: for a Jury of Officers and Attorneys of our Court, being according to an ancient cuſtom, time out of mind of man uſed, ſworn to preſent amongſt other things and Articles, all defaults of Officers and Miniſters in not executing the Writs and Proceſs out of this Court, and all impediments and hindrances whatſoever of the due proceedings of this Court, whereby Juſtice cannot be adminiſtred: And finding upon their Oaths divers unjuſt and undue impediments of the proceedings of this Court, by the ſaid Council in particular: And thereupon a motion being made in open Court in Michaelmas Term laſt, by the Kings Serjeant Philipps, of many intolerable grievances of the Subject, offered by the ſaid Council, to many of his Majeſties Subjects in derogation of the Kings Laws, in prejudice of the Kings profits, and in hindrance of the due proceedings of this Court, prayed the Court according to Law and Juſtice, to grant ſeveral Prohibitions in all thoſe ſeveral cauſes, which we could not deny; but yet thought fit before we granted the ſame, that there might be a good correſpondence betwen both Courts: we ſhould firſt confer with Sir Cuthbert Pepper, Attorney of the Wards and one of that Council, to let him underſtand the particular grievances and oppreſſions, and to hear what he could ſay in the juſtification thereof, who accordingly upon motion came to us to Serjants-Inn, with whom we conferred, and ſignified to him the particulars of the ſaid grievances, who would not take upon him to juſtifie the ſame in no ſort, but ſaid, he would acquaint the Preſident and Council therewith, and return their anſwer, which for that it was neglected, we upon further motion in Court granted Prohibitions, as in Juſtice we ought, which courſe and order of proceedings we hold to be reſpectful and comly toward the Lord Preſident and Council.

4. It was objected, that more Prohibitions had been granted of late, than in many years before, whereunto a ſixfold anſwer was made.

1. That they had exceedingly multiplied the number of cauſes, ſo as they have above two thouſand depending at one time, and having but five Counties and three Towns, at one ſitting there were about 450 cauſes at hearing, whereas the Chancery that extends into 41 Counties Engliſh, and 12 in Wales, in all 53, had in Eaſter Term, but 95 to be heard, and in Trin. Term, but 72; ſo as if they multiply their cauſes ſo infinitely above what were at the firſt, it is no wonder if the number of Prohibitions be increaſed.

2. Beſides the multiplication they have innovated and taken upon them to deal in cauſes which we know never any Preſident could, and we think never any Preſident and Council did uſurp: As firſt, Suits upon penal Laws, and many of them limited to the Courts at Weſtminſter, but all of them without queſtion out of their Juriſdiction: As for example, betwen Harriſon and Thurſtone in Engliſh Bill, upon the Statute 39 Eliz. of Tillage, whereas the very Statute giveth Juriſdiction to certain ſpecial Courts: The Defendants pleaded to the Juriſdiction, whereupon an Attachment was awarded againſt him, and fined.

3. In the caſe of Hartley after Indictment of forcible entry and reſtitution, according to the Statute upon an Engliſh Bill diſpoſſeſſed by the Preſident.

4. And after a recovery in an Ejectione firmæ, and execution by Habere facias poſſeſſionem out of our Court, they upon an Engliſh Bill, diſpoſſeſs'd the Plaintiff, and this was Harts caſe. Between Jackſon and Philipps, after Judgment in our Court, ſuit there by Engliſh Bill. Between Stanton and Child, after execution in debt by proceſs out of our Court they commit the Plaintiff.

Plaintiff, an old man and lame. Between Binns and Collet, after the Defendant was outlawed in an action of Battery.

5. They admitt English Bills in the nature of Writs of Error, and of Formedons and other real actions.

6. They will admit no plea of Out-lawry in disability of the Plaintiff.

7. They usually granted Injunctions to stay the common Law, which is utterly against Law, and sometimes to stay suits in Chancery, and in the Exchequer Chamber, and many other proceedings which are against Law and reason, to the great oppression and grievance of the Subject, so in respect as well of the multiplication of Suits as Innovations of others. It may very well be that more Prohibitions and Habeas Corpus have been granted of late then were in times past; And yet there hath been more granted, and more ancient then is supposed: For Mich. 7. Eliz. Rot. 31. upon a motion made by Carus, the Kings Serjeant, Habeas Corpus was granted out of the Kings Bench, for the body of John Lamburn, alias Lambert, which Writ being returned, that he went to the Castle of York where John Lambert was a Prisoner, and that one Oswald Wilkinson, the Goaler refused to deliver him, without the leave of the Arch-bishop of York: President of the Council there, whereupon he went to the Arch-bishop, and shewed unto him the Queens Writ of Habeas Corpus; whereunto the Arch-bishop answered, that John Lambert was not the Sheriffs Prisoner, but was committed by him and the Council to the Goalers custody, and therefore he should not be delivered, and therefore he sent one Morgan his Secretary to the Goaler, that he should not be delivered; And thereupon as well for the contempt in the Arch-bishop, and the Goaler, as for the insufficient return in not having the body, Carus the Kings Serjeant moved for an Attachment against the Arch-bishop of York, and Wilkinson the Goaler, for the contempt returned by the Sheriff, and it was granted, and the Sheriff was amerced, for that he shewed no lawful cause, Mich. 7. & 8. Eliz. in libro de Habeas Corpus. John Dawson in Prison for a Riot, by English Bill, before the President and Council of York, removed by Habeas Corpus and delivered: for no man ought to be convicted for a Riot, but by Indictment, tryal, or other due process at Law: and there are many other like Writs of latter time, Pasch. 12. Eliz. in libro de Habeas Corpus, Thomas ap Morgan, committed by the Council and President of Wales &c. and finding the cause unjust, bailed him, &c. And in Trin. 20. Eliz. ib. the like Writ for the body of John Rowland, committed by the President and Council of Wales, and finding by the return that the commitment of him was against Law, he was discharged by the Court, and many more of that nature.

8. The Judges never grant either Prohibitions or Habeas Corpus, but upon motion or complaint by the party grieved, so as if the parties have greater cause of complaint then they had in times past, there must of necessity be more Writs of Prohibition and Habeas Corpus granted then was heretofore.

9. The Proceedings before the President and Council, are by absolute power, their decrees uncontrollable and final, and more final then a Judgmen in a Writ of Right, for thereupon a Writ of Error lyeth, but these sentences are unreversible, which makes them adventure, and presume too much upon their authority, and tends to the great oppression and grievance of the Subject.

10. These Suits there grow to be more prejudicial to the King than ever they have been, for by the multiplication and innovation of Suits, as well real as personal, the King loseth his Fines, &c.

11. Remedy

11. Remedy for the time past, if we have erred in Judgment, a Writ of Error lieth in the Kings Bench; if the Kings Bench doth erre, a Writ of Error lieth in the Upper house of Parliament, where the King and the Lords be only Judges.

12. For the time to come, first, that the Instructions be enrolled in the Chancery, whereunto the Subject may have access, and know their Jurisdiction. 2. That the Presidents and Councils have some Council learned in the Court, who may inform us judicially of their true Jurisdiction, and we will give a day to them before we grant any Writ, to shew cause to the contrary; so as Justice upon hearing of both sides shall be done; and if we erre, the Law hath provided a remedy by a Writ of Error, and no other course can be taken: And we are sworn both to maintain the Kings Prerogative and to do Justice to all men, according to the Laws and Customs of England: So as command my Lords, whatsoever it shall please you, that lyeth in our power, and which by our Oath we may perform, and we will most willingly obey it: And that which a great Divine said to God Almighty, we say unto your Lordships who sit in Gods Seat; Da Domine quod jubes, & jube quod vis, &c.

The particular cases set down in the Petition are answered in the second part of our proceedings justifiable untill they plead their Jurisdiction, and make it appear to the Court to be lawful. Concerning the Jury of Attorneys, it hath been answered before: And for the motion to have a Rule set down, &c. It was moved by the Kings Serjeant, and we advised thereupon: when this had been thus delivered, by way of answer, Bacon the Kings Sollicitor offered to reply, but after the Judge had spoken in the name of all his Brethren, the Lords would not suffer him to speak after the Judge; But all others being desired to retire into the next Chamber, the Lords had long and prudent conference amongst themselves, and after we were called in again, and then the Earl of Salisbury, Lord Treasurer, by the consent of that Honourable Table, gave this Resolution;

1. That the Instructions should be recorded for so much as concern'd either criminal Causes, or Causes between party and party: As for matters of State, if any be, the same not to be published.

2. That it was necessary, that both Councils should be within the Survey of Westminster Hall. Viz. The Courts of Westminster.

3. The motion was wel allowed, that the Presidents and Councils should have Council learned in every Court: And that upon motion made in open Court, upon any Prohibition, to either of them, day should be given to shew cause, &c.

4. The Lord Treasurer repeated the sentence, and said, that true it is, *Ubi Lex aut vaga aut incerta, miserrima est servitus*, where mens Estates and fortunes shall be decided by discretion.

And concerning the remoteness of the place, what reason should there be at this time more for those parts, then for the Counties of Cornwal and Devon, which are more remote than York; And this was an end of this daies work.

The

Heresie, Upon conference with Sir *John Popham* and others, An. 43. Eliz.

THe Arch-bishop and other Bishops and other the clergy at a general Synod or Convocation might convict an Heretick by the common Law. But for this, that it was troublesome to call a convocation of the whole Province, it was ordained by the Statute of 2 H. 4. cap. 15. That every Bishop in his Dioces might convict Hereticks; And Note, 2. Mary Brook, title Heresy, per omnes Justic. & Baker Chancellor of the Exchequer, and Hare Master of the rolls by that Statute. And if the Sheriff was present, he might deliver the party convict to be burnt, without any Writ De hæretico comburendo: But if the Sheriff be absent, or if he be to be burnt in another County, then there ought to be a Writ De hæretico comburendo; And that the common Law was such, vide. lib. intra. title Indictment, p. 11. who there are taken for Hereticks, some of them are consonant to true Religion, vide 11 H. 7. Book of Entries fol. 3. 19. see Dr. & St. lib. 2. cap. 29. Cosin. 48. 2. see the Statute of 1 & 2. P. M. cap. 6. That Ordinaries wanting authority to proceed against Hereticks, 3. F. N. B. fol. 269. And the Writ in the Register, which in the new Writ is omitted proves this directly, 4. Bracton lib. 3. cap. 9. fol. 123, 124. Concilio Oxonienſi quidam Diaconus convictus fuit de Apostasia, sed primo degradatus fuit per Ordinarium: And true it is, that every Ordinary may convent any Heretick or Schismatick before him Pro salute animæ, and may degrade him, as Bracton saith, and may injoyn him penance according to the censure of Ecclesiastical Law: But upon such conviction at Common-Law, the party convict shall not be burnt, nor any Writ De hæretico comburendo lyeth upon it: for the common Law will not commit the Decision of a Heresie, for the life of a Christian man, to any sole Judge.

The makers of the Act of 1 Eliz. were in doubt what shall be adjudged Heresie, and therefore if any person be charged with Heresie before the high Commissioners they have no authority to judge any matter or cause to be Heresie, but only such as hath been so adjudged by the authority of canonical Scriptures, as by the four first general Councils, or by any other general Council wherein the same was declared Heresie by the express and plain words of canonical Scripture, or such as shall hereafter be determined to the Heresie by Parliament with the assent of the Convocation, for so it is expressly provided by the said act, of 1 Eliz. And although this proviso extends only to the high Commissioners, yet seeing in the high Commission there be so many Bishops and other Divines and learned men, it may serve for a good direction to others, especially to the Diocesan being a sole Judge in so weighty a cause.

At this day the Diocesan hath jurisdiction of Heresie, and so it hath been put in ure in all Queen Elizabeths Reign, but without the aid of the Act of 2 H. 4. cap. 15. the Diocesan could imprison no person accused of Heresie but was to proceed against him by the censures of the Church: for the Bishop of every dioces might convict any for Heresie before the Statute 2 H. 4. as appears by the preamble of it. But could not imprison, &c. and now seeing that not only the said Act of 2 H. 4. but 25 H. 8. cap. 14. are repealed, the Diocesan cannot imprison any man accused of Heresie, but must proceed against them as he might have done before those Statutes by the censures of the Church; as it appears by the said act of 2 H. 4. cap. 15. Likewise the supposed Statute of 5 Rich. 2. cap. 5. and the Statutes of 2 H. cap. 7. 25 H. 8. cap. 14. 1, and 2. P. and M. cap. 6. are all repealed, so as no Statute made against Hereticks stands now in force, and at this day no person can be indicted or impeached for Heresie before any temporal Judge or other that hath temporal jurisdiction, as upon perusal of the said Statute appeareth.

There was a Statute supposed to be made in 5 R. 2. that Commissions should

should be by the Lord Chancellor made, and directed to Sheriffs, and others to arrest such as should be certified into the Chancery by the Bishops and Prelates, Masters of Divinity, to be preachers of Heresies, and notorious errors, their Factors, Maintainers, and Abetters, and to hold them in strong prison, until they will justifie themselves to the Law of the Holy Church. By colour of this supposed Act, certain persons that held, that Images were not to be worshipped, &c. were holden in strong prison, until they (to redeem their vexation) miserably yielded before these Masters of Divinity to take an Oath, and did swear to worship Images, which was against the Moral and Eternal Law of Almighty God. We have said by colour of the said supposed Statute, &c. not only in respect of the said Opinion, but in respect also, that the said supposed Act, was in truth never any Act of Parliament, though it was entred in the Rolls of the Parliament, for that the Commons never gave their consent thereunto. And therefore, in the next Parliament, though it was entred in the Rolls of the Parliament, for that the Commons never gave their consent thereunto, therefore in the next Parliament, the Commons preferred a Bill reciting the said supposed Act, and constantly affirmed, that they never assented thereunto, and therefore desired that the said supposed Statute might be aniented, and declared to be void: for they protested, that it was never their intent to be justified, and to bind themselves and Successors to the Prelates, more then their Ancestors had done in times past, and hereunto the King gave Royal assent in these words, Leist an Roy. And mark well the manner of the penning of the Act, for seeing the Commons did not assent thereunto, the words of the Act be, It is Ordained and assented in this present Parliament, that, &c. And so it was, being but by the King and the Lords.

It is to be known, that of Ancient time, when any Acts of Parliament were made, to the end the same might be published, and understood, especially before the use of Printing came into England, the Acts of Parliament were ingrossed into Parchment and bundled up together with a Writ in the Kings name, under the great Seal to the Sheriff of every County, sometime in Latin, and sometime in French, to command the Sheriff to proclaim the said Statutes within his Bayliwick, as well within Liberties as without. And this was the course of Parliamentary proceedings before Printing came in use in England, and yet continued after we had the Print, till the Reign of H.7.

Now at the Parliament holden in 5 R. 2. John Braibrooke, Bishop of London being Lord Chancellor of England, caused the said Ordinance of the King and Lords to be inserted into the Parliamentary Writ of Proclamation to be proclaimed among the Acts of Parliament, which Writ I have seen, the purclose of which Writ, after the recital of the Acts directed to the Sheriff of N. is in these words: Nos volentes dictas Concordias, sive Ordinationes in omnibus & singulis suis Articulis inviolabiliter observari, tibi præcipimus quod prædictas Concordias sive Ordinationes in locis infra balivam tuam, ubi melius expedire volueris, tam infra Libertates, quam Extra, publice proclamari & teneri facias juxta formam prænotatam. Teste Rege apud Westm. 26 Maii Anno Regni Regis, R. 2. 5.

But in the Parliamentary Proclamation of the Acts passed in Anno, 6 R. 2. the said Act of 6 R. 2. whereby the said supposed Act of 5 R. 2. was declared to be void, is omitted, and afterwards the said supposed Act of 5 R. 2. was continually printed, and the said Act of 6 R. 2. hath by the Prelates been even from time to time kept from the Print.

Certain Men called Lollards were indicted for Hereſie upon the ſaid Statute of 2 H. 4. for theſe Opinions, viz. Quod non eſt Meritorium ad Sanctum Thomam nec ad Sanctam Mariam de Wallingham peregrinari. 2. Nec Imagines Crucifixi & aliorum Sanctorum adorare. 3. Nulli Sacerdoti Confiteri niſi ſoli Deo, &c. Which Opinions were ſo far from Hereſie, as the makers of the Statute of 1 Eliz. had great cauſe to limit, what Hereſie was.

Mich. 6 Jac. Regis.

Prohibition.

IN the caſe of Langdale in this very Term, in a Prohibition to the high Commiſſioners, two points were moved; The one, if a Feme-covert may ſue for Alimony before the high Commiſſioners. The other, if the Court of the Common pleas may grant a Prohibition, when no plea is pendent in the Common pleas: As in this caſe no plea can there depend betwixt Husband and Wife. And forasmuch as this concerns the Jurisdiction of the Court, this was firſt of all debated, divers objections were made againſt it.

1. That this Court hath not Jurisdiction to hold plea without an Original, unleſs it be by priviledge of an Attorney, Officer, or Clerk of the Court, unleſs that it be in an eſpecial caſe, viz. when there is an Action there depending for the ſame cauſe; then it was agreed that a Prohibition ſhall be awarded out of the Common pleas, in reſpect that the Court hath an Action there depending for the ſame cauſe, and ſo being poſſeſſed of the cauſe, it gave the Court Jurisdiction to award Prohibition out of the ſame Court: And for that the Prohibition ought to recite, Quod cum tale placitum pendet, &c. and the Defendant Pendente placito prædicto, hath purſued in Court Chriſtian: And with this accords F.N.B. 43.g. where it is ſaid, that if a man be ſued in the Common pleas for a Treſpaſs, if the Plaintiff alſo ſue in Court Chriſtian for the ſame cauſe, the Defendant may ſhew this in the Common pleas, and ſhall have a Prohibition then directed to the Judges: And ſo always when the matter is pendent in the Common pleas, if ſuit be for the ſame cauſe in Court Chriſtian, he ſhall have a Prohibition: But a man ſhall have a Prohibition out of the Chancery, or Kings Bench upon his ſurmiſe, ſurmiſing that he is ſued in Court Chriſtian for a Temporal cauſe: And 2 Ed. 4. 11. 6. was cited, where it is held that Ne admittas, which is a Prohibition, doth not lie unleſs that the Quare impedit be pendent.

But it was anſwered and reſolved by Coke chief Juſtice, Warberton, Daniel, and Foſter, Juſtices, that the Common pleas may award a Prohibition, although that no ſuit be there pendent, for this, that the Common pleas is the principal Court of Common Law for Common pleas: For it belongs to the Jurisdiction of the Common pleas to determine all Common pleas.

Communia placita non ſequantur Curiam noſtram, as it is enacted by Magna Charta, which hath thirty two times been confirmed by other Acts of Parliament: Then if the Eccleſiaſtical Judges incroach upon the Juriſdiction of the Common pleas to hold plea of any thing againſt the Common Law of the Land, or of any thing triable by the Law, there the principal Court of Common Law ſhall grant a Prohibition, and that without Original Writ, for divers cauſes.

1. For

1, For that no Original Writ of Prohibition which issues out of the Chancery is returnable either in the Kings Bench or common Pleas, but is directed to Judge, or party, or both, and is not returnable at all: But it appears in the Register, that if the Prohibition be contemned, then the Chancellor may award an Attachment to punish this contempt, returnable either in the Common pleas, or in the Kings Bench: But an Attachment in such case is but as a Judicial Writ; And this appears by the Register, fol. 33. And if the Attachment in such case be returnable into the Common pleas, &c. the Plaintiff in the Declaration shall make mention of an Original Writ in the Chancery, and of the contempt, &c.

2. There was great reason that no Original Writ of Prohibition shall be returnable, for the common Law was a Prohibition in it self, and he who did encroach upon the Jurisdiction of it incurred a contempt: And with this agree our Books, as 9 H. 6. 56. in Attachment upon a Prohibition in the Common pleas, before William Babington then chief Justice of the Bench, concerning a Suit in Court Christian of tythes of grols Trees: And there Fulthorp the Serjeant took exception to the Count, for this, that the Plaintiff in his Count did not declare upon any Statute, nor that any Prohibition, scil. Original Writ, was directed unto him: And there it is held, that the Statute of 45 Edward 3. and the common Law also was a Prohibition in it self: And thus the Rule of the Book, 19 H. 6. 54. Prohibition, for this, that one had sued in a Court Baron against the common Law; And there Asciue said, the Statute is a Prohibition in it self, so it is held in 8 R. 2. title Attachment sur Prohibition, 15. Note, by Clopton in the Common pleas, who then was a Serjeant, that if a Plea be held in Court Christian, which belongs to the Court of the King, without any Prohibition in facto, the Plaintiff shall have an Attachment upon a Prohibition, for this, that the Law is a Prohibition in it self; for by the Law they ought to hold no plea, but that which doth belong to their Jurisdiction, quod fuit concessum, &c. Register 77. Estrepment. Præcipimus quod inhibeas, &c. Fitz. N. B. 259. Register 112. Supersedeas to a Court Baron, for holding Plea Vi & armis, for above forty shillings: And F. N. B. a Writ of Consultation is as much an Original as a Prohibition; yet the Common pleas hath granted infinite Consultations, ergo Prohibitions; Qui habet jurisdictionem absolvendi, habet jurisdictionem ligandi: And one Writ is as Original as the other.

Note, there are several Writs of Express Prohibitions, scil. Prohibitions with this Word Prohibemus vobis, and Letters in the nature of Prohibitions, as Supersedeas, by which it is commanded, Quod supersed. in placito prædicto. And Injunction is a Prohibition, also in its nature, for the words are an Injunction to the party, not to the Judge; and a Supersedeas is to an Officer or Judge, not to the party.

Express Prohibitions are in two manners, the one founded upon a Suggestion, the other upon Record; upon Suggestion where no plea is pendent, but the Suggestion is the Foundation, for it is not so when a plea is pendent; upon record when the plea is pendent, Prohibitions founded upon Record as, Ne admittas, &c. ought to recite the plea pendent, for all those which are founded upon Record ought to recite a plea pendent. So a Writ to the Bishop to admit a Clerk, is a Judicial Latitat, as Dyer defends it: And as to the Book of 2 Edw. 4. it is well agreed, that this doth not lie in the Common pleas, unless a Quare impedit be depending, for this ought to recite a Writ to be depending; and it should be against reason to restrain any to present, or to make Waste by Estrepment, unless that a Writ be pendent;

And as to the Opinion of Fitzherbert, it was affirmed for good Law, for every one agrees it, that if a Plea be pendent in the Common Pleas, then a Prohibition there lies, and the pendency or not pendency of a Plea is not material for divers causes.

1. The pendency of a Plea may give a priviledge to the party, but no Jurisdiction to the Court in collateral Suit: And there is a diversity betwixt priviledge to the party, and Jurisdiction of Court, for a plea pendent may give Jurisdiction to the party, Eundo, redeundo & morando; but doth not give Jurisdiction to the Court to hold plea by Bill by collateral Suit against any other, as an Officer, Attorney or Clerk may.

2. The Prohibition in such case where Plea is pendent is no process Judicial upon the Record, for it is a collateral Suit.

3. If the common Pleas, which is the proper Court for common Pleas, cannot grant a Prohibition without a Plea pendent; certainly the Kings Bench, which holds plea of common Pleas, by secondary means, cannot do it: And so the Archbishop of Canterbury in his Articles concerning Prohibitions, holds, that neither the one Court nor the other may grant Prohibitions in such a case: But inasmuch as the common Law is instead of an Original, as hath been said, both Courts may grant it.

4. Infinite Presidents may be shewn of Prohibitions out of the common Pleas, without recital of any plea pendent, as is agreed on the other part: And true it is, that it ought not to be so, if the Court hath not Jurisdiction to grant any without plea pendent. Every petty Clerk of the Common Law shall have by his priviledge a prohibition without plea pendent: à fortiori, the Common Law it self may prohibit any one, who against the common Law shall incroach upon its Jurisdiction, and enquire of things done against the Jurisdiction of the Court. Plea pendent is cause of priviledge and not of Jurisdiction, 4 Ed.4.37. 37 H. 8.4. Action or information upon the Statute of 2 H.5.cap.5. is but an information to the Court of wrong done to the common Law, for this, that no Original Writ lies, as upon penal Law, upon Malum prohibitum, this is Malum in se, de quo Curia intelligi & informari voluit.

5. A President is in 22 Ed.4. where a Prohibition was granted out of the Common Pleas, for that the Plaintiff might have a Writ of false Judgment at the Common Law: The Record it self agrees with the Report.

6. Officers and Clerks, as well in the Common Pleas, as in the Exchequer, and Farmers of the King in the Exchequer, may have by priviledge of Court a Prohibition without Original: à fortiori, the Law it self shall have greater priviledge than an Officer or Clerk, and certainly to enforce the party to bring an action, will be a means to multiply Suits to no end, for the Law it self in 4 Ed.4. fol.37. if any man upon the Statute of 2 H.5. for not delivering of a libel, be brought into the Common Pleas: And if he cannot have a Prohibition without such Suit this shall be a cause, as hath been said, to multiply Suits, and is against the publick Weal: For he will bring his action upon the Statute before that he will be deprived of his Prohibition, and by that he gives himself cause of Prohibition; every Prohibition is as well at the Suit of the King as of the party, as is held in 28 Ed. 3. 97. false Latin shall not abate, nor Excommunication in the plaint is no plea: For this is the Suit of the King, as well for his Jurisdiction as for the party, who by Law may chuse his Court, 15 Ed. 3. title Corrody 4. The King may sue for this contempt where he pleaseth.

Note,

Note, that although the Original cause was in the Kings Bench for Corody, Excommunication is no plea in disability of the Plaintiff, because it is the Suit of the King for contempt to his Law, vide 21 H.7.71. Kelway 6. in quare non admisit. 4 Ed.4. 37. for not delivery of a Libel in the Common Pleas, and then he shall have a Prohibition by all the Justices: So upon the Statute of 2 Ed. 6.cap.13. for suing for Tithes where there is a prescription, &c. And this shall be to introduce multiplication of Suits, when himself gives cause of Prohibition. 38 H.6. 14. 22 Ed. 4.20. 13 Ed. 3. title Prohibition 11. after a Judgment in the Common Pleas, after which the Patron sues the Recoverer in Chancery, surmising equity, Attachment upon a Prohibition out of the Common Pleas, yet no plea pendent.

Note, the Reporter reporteth this Attachment to issue out of the common Pleas, for the Chancellor would not prohibit him.

32 H. 6. 34. An Attorney in the Palace assaulted and menaced, the Court shall take a Bill and enquire of it, 4 Ed.4.36, 37. there a Prohibition without view of Libel, for this, that action was pendent, Statham Prohibition 3.

Prohibition super Articulos, title Prohibition plea 5. gives a Prohibition before, scil. Coram Justiciariis nostris apud West. vide F.N.B.fol.69.b. in a Writ of Pone, Register indic. coram Justiciariis nostris apud West. is the common Pleas. F.N.B. 64.d. 38 Ed.3. 14. Statute 2 Ed. 6. cap. 13. such Courts grant Prohibition who have used to grant them: Hales case in my Reports. Note, the reason that many Prohibitions were granted in the Kings Bench, for that no Writ of Error lies but in the plaint.

Mich. 6 Jac.

Mich.6. Jac.Rot.639.Robert Bancks Gent, brought an Action upon the Statute of Winton 13 Ed.1. against the Inhabitants of the hundred of Burnham, in the County of Bucks, and counted, that certain Mildoers to the Plaintiff unknown, at Hitcham in the County aforesaid, which Town is in the Hundred of Burnham, the 22 Novemb. An. Regni Regis Jacobi 5. assaulted the Plaintiff, and robbed him of 25 l. 3 s. 2 d. ob. and that the Plaintiff immediately after the Robbery, scil. the 22 of November at Joplow and Manlow, in the County aforesaid, which were Towns next the said Town of Hitcham, within the said Hundred, made Hue and Cry of the said Robbery, and gave notice of the said Robbery to the Inhabitants of the said Towns of Joplow and Manlow, and after the said Robbery, and within twenty days before the purchase of the Writ, scil. 19 day of February, Anno 5. at Dorney in the County aforesaid, the Plaintiff before Sir William Gerrard Knight, then Justice of peace within the same County, an Inhabitant next to the said Hundred, being examined upon his Oath, according to the Statute of 27 Eliz. the Plaintiff upon his Oath said, That he did not know the parties who did rob him, nor any of them: And since the said Robbery are forty days past, and the Inhabitants of the said Hundred of Burnham, have not made amends of the said Robbery to the Plaintiff, nor the body of the Felons and Mildoers aforesaid, nor any of them have taken, nor answered their bodies, nor the bodies of any of them, but have suffered the Felons to escape,

Sur Statute de Winton.

eſcape, to which the Defendants plead (not guilty) and a Venire facias was awarded to the Sheriff, De vicineto of the Hundred of Stoke, which is the Hundred next adjacent to the ſaid Hundred of Burnham: And the Jury gave a ſpecial Verdict, they found that the Plaintiff was robbed, and that he made Hue and Cry in manner and form, as he hath counted and found over, that the Plaintiff was ſworn before the ſaid Sir William Gerrard, then being a Juſtice of peace within the ſame County, and an Inhabitant next unto the Hundred of Burnham, and ſaid upon his Oath in theſe Engliſh words, That he, on Thurſday being the two and twentieth day of Novemb. 1608. riding under Hitcham Wood, in the Pariſh of Hitcham, within the Hundred of Burnham, was then and there ſet upon by two Horſe-men, which then, nor at this preſent he did, nor doth know, and by them robbed and ſpoiled of the juſt ſum of 25 l. 3 s. 2 d. ob. not without great danger of his life: But whether the ſaid Oath ſo taken is true, according to the form and effect of the ſaid Act of 27 Eliz. and according to the Count, the Jurors pray the direction of the Court.

Mich. 6. Jac.

Bonum publicum.

IN an action of Treſpaſs brought by Mouſe, for a Caſket, and a hundred and thirteen pound, taken and carried away; the caſe was, The Ferry-man of Gravelend took forty ſeven Paſſengers into his Barge, to paſs to London, and Mouſe was one of them, and the Barge being upon the water, a great Tempeſt hapned, and a ſtrong wind, ſo that the Barge and all the Paſſengers were in danger to be drowned, if a Hogſhead of Wine and other ponderous things were not caſt out, for the ſafeguard of the Lives of the Men: It was reſolved *Per totam Curiam*, that in a caſe of neceſſity, for the ſaving of the lives of the Paſſengers, it was lawful to the Defendant being a Paſſenger to caſt the Casket of the Plaintiff out of the Barge, with the other things in it, for *Quod quis ob tutelam corporis ſui fecerit, jure id feciſſe videtur*, to which the Defendant pleads all this ſpecial matter; And the Plaintiff replies, *De injuria ſua propria abſque tali cauſa:* And the firſt day of this Term, this Iſſue was tried, and it was proved directly, that if the things had not been caſt out of the Barge, the Paſſengers had been drowned; and that *Levandi cauſa*, they were ejected, ſome by one Paſſenger and ſome by another; and upon this the Plaintiff was non-ſuit.

It was alſo reſolved, that although the Ferry-man ſurcharge the Barge, yet for ſafety of the lives of Paſſengers in ſuch a time and accident of neceſſity, it is lawful for any Paſſenger to caſt the things out of the Barge: And the Owners ſhall have their remedy upon the ſur-charge againſt the Ferry-man, for the fault was in him upon the ſur-charge: but if no ſur-charge was, but the danger accrued only by the act of God; as by tempeſt, no default being in the Ferry-man, every one ought to bear his loſs for ſafeguard of the life of a man, for *Intereſt Reipublicæ quod homines conſerventur*, 8 Ed. 4. 23. Bull, &c. 12 H. 8. 15. 28 H. 8. Dyer 36. plucking down of a Houſe, in time of fire, &c. And this *Pro bono publico, & conſervatio vitæ hominis eſt bonum publicum.* So if a Tempeſt ariſe in the Sea, *Levandæ navis cauſa*, and for the ſalvation of the lives of men, it may be lawful for Paſſengers to caſt over the merchandizes, &c.

Mich.

Mich. 5. Jac.

Prohibitions del Roy.

NOte, upon Sunday the tenth of November, in this same Term, the King, upon complaint made to him by Bancroft Archbishop of Canterbury, concerning Prohibitions, the King was informed, that when Question was made of what matters the Ecclesiastical Judges have cognizance, either upon the Exposition of the Statutes concerning Tythes, or any other thing Ecclesiastical, or upon the Statute 1 Eliz. concerning the High Commission, or in any other case in which there is not express Authority in Law, the King himself may decide it in his Royal person; and that the Judges are but the Delegates of the King, and that the King may take what causes he shall please to determine, from the determination of the Judges, and may determine them himself. And the Archbishop said, that it was clear in Divinity, that such Authority belongs to the King by the Word of God in the Scripture. To which it was answered by me, in the presence, and with the clear consent of all the Justices of England and Barons of the Exchequer, that the King in his own person cannot adjudge any case, either criminal, as Treason, Felony, &c. or betwixt party and party, concerning his Inheritance, Chattels, or Goods, &c. but this ought to be determined and adjudged in some Court of Justice, according to the Law and Custome of England, and always Judgments are given, Ideo consideratum est per Curiam, so that the Court gives the Judgment: And the King hath his Court, viz. in the upper House of Parliament, in which he with his Lords is the supream Judge over all other Judges; For if Error be in the Common pleas, that may be reversed in the Kings Bench: And if the Court of Kings Bench erre, that may be reversed in the Upper house of Parliament, by the King, with the assent of the Lords Spiritual and Temporal, without the Commons: And in this respect the King is called the Chief Justice, 20 H. 7. 7. a. by Brudnell: And it appears in our Books, that the King may sit in the Star-chamber; but this was to consult with the Justices, upon certain Questions proposed to them, and not in Judicio; So in the Kings Bench he may sit, but the Court gives the Judgment: And it is commonly said in our Books, that the King is always present in Court in the Judgment of Law; and upon this he cannot be non-suit: But the Judgments are always given per Curiam; and the Judges are sworn to execute Justice according to the Law and custome of England. And it appears by the Act of Parliament, of 2 Ed. 3. cap. 9. 2 Ed. 3. cap. 1. That neither by the Great Seal, nor by the Little Seal, Justice shall be delayed; ergo, the King cannot take any cause out of any of his Courts, and give Judgment upon it himself; but in his own cause he may stay it, as it doth appear, 11 H. 4. 8. And the Judges informed the King, that no King after the Conquest assumed to himself to give any Judgment in any cause whatsoever, which concerned the administration of Justice within this Realm; but these were solely determined in the Courts of Justice: And the King cannot arrest any man, as the Book is in 1 H. 7. 4. for the party cannot have remedy against the King; so if the

2 R. 3. 9. 21 H. 7, 8. 17 H. 6. 14. 39 Ed. 3. 14.

the King give any Judgment, what remedy can the party have, vide 39 Ed.3. 14. One who had a Judgment reversed before the Council of State: it was held utterly void, for that it was not a place where Judgment may be reversed, vide 1 H. 7. 4. Hussey Chief Justice, who was Attorney to Ed. 4. reports, that Sir John Markham chief Justice said to King Edw. 4. That the King cannot arrest a man for suspicion of Treason or Felony, as other of his Lieges may; for that if it be a wrong to the party grieved, he can have no remedy: And it was greatly marvelled that the Archbishop durst inform the King, that such absolute power and authority as is aforesaid, belonged to the King by the Word of God, vide 4 H. 4. cap. 22. which being translated into Latin, the effect is, Judicia in Curia Regis reddita non annihilentur, sed stet judicium in suo robore quousque per judicium Curiæ Regis tanquam erroneum, &c. vide West. 2. cap. 5. vide le Stat. de Marlbridge. cap. 1. Provisum est, concordatum, & concessum, quod tam majores quam minores justitiam habeant & recipiant in Curia Domini Regis, & vide le Stat. de Mag. Charta. cap. 29. 25 Ed. 3. cap. 5. None may be taken by petition or suggestion made to our Lord the King or his Council, unless by Judgment: And 43 Ed. 3. cap. 3. no man shall be put to answer without presentment before the Justices, matter of Record, or by due Process, or by Writ Original, according to the ancient Law of the Land: And if any thing be done against it, it shall be void in Law and held for Error, vide 28 E. 3. cap. 3. 37 Ed. 3. cap. 18. vide 17 R. 2. ex rotulis Parliamenti in Turri act. 10. A controversie of Land between parties was heard by the King, and sentence given, which was repealed, for this, that it did belong to the common Law: Then the King said, that he thought the Law was founded upon reason, and that he and others had reason, as well as the Judges: To which it was answered by me, that true it was, that God had endowed his Majesty with excellent Science and great endowments of Nature; but his Majesty was not learned in the Laws of his Realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his Subjects; they are not to be decided by natural reason, but by the artificial reason and judgment of Law, which Law is an act which requires long study and experience, before that a man can attain to the cognizance of it; And that the Law was the golden Met-wand and measure to try the Causes of the Subjects; and which protected his Majesty in safety and peace: With which the King was greatly offended, and said, that then he should be under the Law, which was Treason to affirm, as he said; To which I said, that Bracton saith, Quod Rex non debet esse sub homine, sed sub Deo & Lege.

Mich.

Mich. 8. Iac. Regis.

IN this Term, in the case of one Roberts, a Prohibition had been granted in a case of subtraction of Tithes, upon surmise that the Plaintiff being Defendant in the Spiritual Court, had but one Witness in that Court to prove his Demise; to which that Court said, that Singularis testis is not allowable: And upon consideration and sight of a Prohibition granted upon the same cause in Hill. 3 Eliz. in banco Regis, it was resolved by Coke chief Justice, Et totam Curiam in communi banco, that consultation should be granted, and that for divers causes. Court Ecclesiasticall. Prohibition.

1. It appears by the Register fol. 5. that it is put for a rule, Quod non est consonum rationi, quod cognitio accessorii in Curia Christianitatis impediatur, ubi cognitio causæ principalis ad forum Ecclesiasticum noscitur pertinere: And with this agrees 1 R. 3, 4.

2. If such a Surmise shall be allowed, then in every case for mere delay such a Surmise may be made; for he who was Plaintiff in the Spiritual Court cannot deny, that where it is surmised that he hath one Witness, that he hath two or more, for then he affirms matter against himself: And when the Spiritual Court hath Jurisdiction of the principal Cause, they determine the accessory. But it was objected, that if A. claiming a Lease by B. of a Rectory, Libels for subtraction of Tithes, and the Defendant pleads a former Lease made by B. and C. and the Defendant hath but one Witness in the case to prove the former Lease, if no Prohibition shall be granted, the Defendant shall be charged: And if C. sue him upon the Statute of 2 Ed. 6. at the common Law, the testimony of one only will there be sufficient, and so he shall be twice charged: To which it was answered, that first the fault was the Defendants, that he would not set forth his Tithes, and then he shall be charged whosoever takes them: But in such a case, those of the Ecclesiasticall Court will upon one good Witness, and any concurrent vehement presumption, as possession, or the like, allow of such a proof: And the testimony of Witness in our Law is no concluside evidence, but ought to be left to the conscience of the Jury, and so the validity or invalidity of proof of matters of Fait shall be left to them: but if a question of the Common Law arise from the party upon the construction of a Statute, or the like, and those of the Ecclesiastical Court will take upon them to judge of it against the rule of Law, there upon special surmise of it, and upon shewing of the answer or other pleadings of the parties, by which it appears to the Court, that such surmise is a good ground, a Prohibition lies: for matter in Law, arising upon Estates or Interests done by the common Law and construction of Statutes, ought to be determined according to the rules of common Law, Et non debet trahi ad aliud examen.

And Coke chief Justice cited a notable Judgment, Pasch. 35 Eliz. in banke le Roy. Fuller brought a Prohibition against Clements and Wiskard; and Fuller counted that he himself was Owner of the Rectory of Longham in the County of Norfolk, and libelled against Clements one of the Defendants, before the Official of the Bishop of Norwich, for subtraction of Tithes, scil. of Wheat, &c. pendent which Suit, the said Wiskard, intervening Pro interesse suo, made these Allegations against the said Fuller.

1. That the ſaid Rectory was impropriate to the Monaſtery of Wendling and by the diſſolution of the ſaid Monaſtery, came to the hands of H. 8. and did convey it by Meaſn diſcent to Quæn Eliz. who by her Letters Patents of concealment granted it to Min, and Hall, who enfeoffed Bozome who did let it to Wiskard for four years, and proved his Allegations by Witneſſes, upon which in fine, ſentence was given againſt Fuller, and eight pounds ten ſhillings given to Clements for coſts, and thirtæn pounds ſix ſhillings to Wiskard: And after Fuller did appeal to the Court of the Arches, and there Fuller claimed the ſaid Rectory by reaſon that Hall was ſeiſed of it and by his Dæd gave and granted the ſaid Rectory, and all Lands and Tithes to it appertaining, to Sir Edward Clere before the Feoffment ſuppoſed to be made to Bozome: And that Sir Edward Clere by his Dæd did enfeoff Fuller; and although that he offered to prove the delivery of the Dæd of the ſaid Feoffment made to Sir Edward Clere by one ſole Witneſs, the Eccleſiaſtical Court would not allow it, without producing another Witneſs: And Fuller further ſaid, that although he had further alledged there, that theſe were matters determinable at the Common Law, notwithſtanding they gave ſentence: the Defendants for to have a Conſultation pleaded, that Fuller in the ſaid Court of the Arches proved the Delivery of the Dæd aforeſaid, by Sir Edward Clere and Mouſe, but could not prove Livery and Seiſin according to the Dæd: And for this cauſe ſentence was given, without that the Judges of the Arches would not admit the ſaid proof unleſs he proved the Dæd by other Witneſſes, upon which Fuller demurred in Law; and it was objected by the Council of Fuller,

1 That Wiskard, who is a mær ſtranger to the Suit, and who comes in Pro intereſſe ſuo in the ſaid Rectory, pleads matter meerly determinable at the common Law, ſcil. Letters Patents, Feoffment, and Leaſe for yeárs; And on the other part Fuller claims an Eſtate in the ſaid Rectory by conveyance at the Common Law. And now the queſtion in the Eccleſiaſtical Court being only who hath the beſt Eſtate in the ſaid Rectory by the Common Law this ought to be tryed by the Common Law, and not in the Eccleſiaſtical Court, for this is the birth-right of the Subject to have his Inheritance and Free-hold tryed and determined by the common Law; for the Civil Law differs much in deciding of Inheritances.

2. It was objected, that all matters in Law ought to be determined by the Judges of the Law, and in this caſe matters of Law ariſing, ſcil. If a man hath a Rectory Impropriate, which conſiſts in Glebe and Tithes, and by his Deed gives and grants the ſaid Rectory, and all Lands and Tithes any way belonging or appertaining to it, to another and his heirs, and no Livery is made in this caſe, if the Tithes ſhall paſs, or no, for that Tithes may paſs without any Livery: This queſtion is not fit to be determined by the Eccleſiaſtical Judges, but by the Judges of the Common Law, Quod quiſque novit, in hoc ſe exerceat.

3. It was objected, that Wiskard was a meer ſtranger to the Suit, and all his Allegation is temporal, and for that it is a ſtronger caſe to maintain a Prohibition, foraſmuch as betwixt him and Fuller nothing is in queſtion, but to whom the Inheritance of the Rectory belongs; But Clements, who is ſued for ſubtraction of Tithes, hath greater colour in his defence, being lawfully ſued in the Eccleſiaſtical Court, than for Wiskard, who is no party to the Suit for any Eccleſiaſtical cauſe, but all his Allegation, as hath bæn ſaid, is temporal.

4, It was objected, that Fuller had but one Witneſs to prove the delivery of the Dæd; and in the Eccleſiaſtical Law, Unus teſtis, eſt nullus teſtis, For all which cauſes it was prayed that the Prohibition may ſtand, and that no conſultation may be granted.

To

To which it was answered and resolved by Sir Christopher Wray chief Justice, and Per totam Curiam;

1. That to the first Objection, for that the Original belongs to the Ecclesiastical Court, the determination of all that which depends upon it belongs to the Judges of the same Court, although that the matter be tryable by the common Law: but where the Original matter belongs to the common Law, and there commenced, and issue be taken upon matter tryable by the Ecclesiastical Law, there the Judges of our Law shall write to the Judges of the Ecclesiastical Court to try it, and to certifie: and the reason of this diversity is, that our Judges having authority to write & command them by the Kings Writ to certifie them, but they cannot write to the Judges of our Law to try any thing, and to certifie them, for they have no such authority to command by Writ, but to obey the Writs of the King: As in any action Ancestral, if Bastardy be pleaded in the Demandant, and upon this issue is joyned, this shall be tryed by the Bishop, and his certificate shall bind: so in a Quare impedit, if issue be taken, whether a Clerk, which was presented was able, or not able, this shall be tryed by examination of a Clerk; and certified by the Bishop: but although that such issues are in their nature tryable by the Ecclesiastical Law, yet if the case was such, that the Ecclesiastical Court could not try it, then (to the end that Justice shall not be wanting) such Ecclesiastical matter shall be tryed by the common Law, as 4 Ed. 3. 26. if the Presentee be dead, if he was able, or not able, shall be tryed Per paiis; for the Bishop cannot try it: But against this was objected the Statute de Articulis Cleri cap. 13. by which it is provided, Quod de idoneitate Personæ præsentatæ ad beneficium Ecclesiasticum, pertineat examinatio ad Judicem Ecclesiasticum: upon which it was concluded, that the tryal De idoneitate personæ, in all cases belongs to the Court Christian. To which it was answered and resolved, that true it is, that the tryal of ability belongs to them; but the Statute explains it in what manner it shall be made, for the Statute saith, Pertinet examinatio ad Judicem Ecclesiasticum, so that this tryal ought to be by examination of the party, and this cannot be when the Præsentæ is dead: And although he be not party to the Writ, yet he may be examined; And with this agrees 39 Ed. 3. 2. The Earl of Arundels case, and 4 Ed. 3. 25. 16 Eliz. Dyer 327. So if Bastardy be alledged in one who is not party to the Writ: there, for this; that the Certificate binds for ever, it should be against Law and reason that he should not be party to the Certificate; for this cause in such case it shall be tryed Per paijs, and if any difficulty ariseth upon it the Judges of our Law use to consult with the Judges Ecclesiastical; and with this accords 4 Ed. 3. 37. The same Law of profession, 42 Ed. 3. 5. 8. So if Bastardy be alledged in one who is dead, vide 17. Ed. 3. where Bastardy is alledged in the Tenent and one who is a stranger to the Writ, who are Sisters, vide, 32 Ed. 3. tryal 59. where the Tenant alledgeth Bastardy in himself, and the Demandant doth aver him Mulier, vide 29 Ass. pl. 14. 6. Eliz. Dy. 226. 228. If the Issue be Quod vacavit per resignationem, part of which is temporal and part spiritual, this shall be tryed Per paijs, vide 9 H. 7. Profession and the time of it, &c. But admission and institution, although that it be alledged in a stranger to the Writ, yet this shall be tryed by the Ordinary; as it appears 7 Ed. 6. 7 8. 6. in Dyer, for admission, Institution, Resignation, Et similia, are judicial acts, and remain in their Courts and Register, upon which they ground their Certificate, otherwise it is of Bastardy, Idoneity, &c. By which it appears, that in divers cases the Judges of the Common Law write to the Ecclesiastical Judges, commanding them to certifie some thing put in issue; and the Judges of our Law prohi-

bite the Judges Ecclesiastical to hold Plea of some things which are determinable at Common Law; But the Court Ecclesiastical hath not power to write to our Judges, or to command them, or to prohibite them when they hold plea of things determinable by the Ecclesiastical Judges; but this is erroneous, and shall be reversed by Error. And of the other side, if in the Ecclesiastical Court the Suit is for a Legacy, and the Defendant plead a Release, if in the admitting or rejecting of proofs concerning this Release, which is matter determinable at Common Law, they do wrong to the Plaintiff or Defendant, they have no remedy but by way of appeal.

2. To the second it was answered and resolved, that if upon Consultation with men learned in the Law, they give sentence according to Law, this is well done, and no prohibition ought to be granted, but if they take upon them to draw the Interest of any man, Ad aliud examen, and to judge against the Rule of Law, concerning the Inheritance or Interest of any, there Prohibition lies: And in the case at the Bar, they well resolved the Law, for by the said Livery of the Charter the Tithes do not pass as in gross, for this, that the intention of the parties was to pass the intire Rectory by Feoffment, and not to pass the Tithes by the same, and so to dismember the Rectory by Fractions, and that by construction of Law, against the intention of the parties.

3. As to the third, it was answered and resolved, that by the Ecclesiastical Law, a stranger may come in Pro interesse suo; And when they have jurisdiction of the Original cause of the Suit, we ought not to draw in question their order and proceeding, but if they proceed inverso ordine, or not observing form, this ought to be redressed by appeal: And although that the matter depending upon the Original cause be determinable by the Common Law, yet it shall be determined, as it hath been said, in the Ecclesiastical Court.

4. As to the fourth objection, it was answered and resolved, that such a Surmise, that he hath but one Witness, is not sufficient to have a Prohibition, for this, that the Ecclesiastical Court hath Jurisdiction of the Principle, and if such a Surmise shall be sufficient, all Suits in the Ecclesiastical Court shall be either delayed, or quite taken away, for such a Surmise may be made in every case; and the Plaintiff in the Ecclesiastical Court cannot have any good answer to it to have a consultation, which agrees with the resolution in the principal Case, &c.

It was resolved, upon evidence, by Coke chief Justice De banco, inter I. S. who informed upon the Statute of Usury, and Smith, that the parties to the supposed usurious Contract shall not be admitted Witnesses, for this, that upon the matter they were Testes in propria causa, and by their Oath shall avoid their Bond, &c. or shall be revenged on him who lent them the mony, before they are enforced to repay it: And for the most part they incite, and raise up one of their own Servants, to inform and have part of the thing recovered.

High

High Commissioners.

Trin. 8. Jacobi Regis.

UPon a Habeas Corpus by Eliz. Lady Throgmorton, Prisoner in the Fleet, the return was, the Lady Throgmorton was committed by George Bishop of London and others Ecclesiastical Commissioners, under their hands, till further order should be taken for her enlargement: And the cause of commitment of her was, for that she had done many evil offices betwixt Sir James Scudamore, and her Daughter the Lady Scudamore, Wife of the said James, and to make separation betwixt them, and detained her from her Husband: And upon her departure after sentence before the Commissioners, for divers contemptuous words against the Court, saying, that she had neither Law nor Justice there: And it was resolved, that for detaining of the Wife, and endeavoring to make separation, no Suit can be before the high Commissioners, for that it is not any enormous offence within the meaning of the Act.

2. For the detaining of the Wife, there is remedy by the Common Law.

3. Without Question, for such an Offence they cannot Imprison the Wife.

4. By the words it doth not appear, that they were spoken in the Court.

Secondly, It is no Court of Record, for that they proceed according to the Civil Law, and it is like the Admiralty Court; and for this they cannot Imprison, for none shall be Committed for misdemeanour in Court, unless that the Court be of Record.

5. It doth not appear by the return what Court this was, which is uncertain; And upon this, upon good consideration she was bayled.

But Randal and Hickings was this very Term committed by the high Commissioners, for that they were vehemently suspected to be Brownists, &c. And they obtained a Habeas Corpus, and were remanded for this, that the high Commissioners have power to commit for Heresie. *Quære.*

The Lord of Aburgavenie's *Case.*

IN the Parliament a Question Was made by the Lord of Northampton, Lord privy Seal, in the Upper house of Parliament: That one Edward Nevil, the father of Edward Nevil, Lord of Aburgaveny, which now is, in the 2, and 3. of Queen MARY, was called by Writ to Parliament, and dyed before the Parliament: If he was a Baron, or no, and so ought to be named, was the Question. And it was resolved by the Lord Chancellor, the two chief Justices, chief Baron, and divers other Justices there present, that the direction and delivery of the Writ did not make a Baron or Noble, until he did come unto Parliament, and there sit, according to the commandment of the Writ; for untill that, the Writ did not take its effect, and the words of the Writ were well penned, which are, Rex & Regina, &c. Edwardo Nevil de Aburgaveney Chivalier, Quia de advisamento & assensu concilii nostri pro quibusdam arduis, & urgentibus negotiis statum & defensionem Regni nostri Angliæ concernentibus, quoddam Parliamentum

The Writ doth not make a Peer, &c.

Parliamentum noſtrum apud Weſtmonaſterium, 21. die Octobris proximo futuro teneri ordinavimus, & ibidem vobiſcum, ac cum Prelatis, Magnatibus & Proceribus dicti regni noſtri colloquium habere & tractatum: Vobis in fide & Ligeantia, quibus nobis tenemini, firmiter injungendo mandamus, quod conſideratis dictorum negotiorum arduitate & periculis imminentibus, ceſſante excuſatione quacunque, dictis die & loco perſonaliter interſitis nobiſcum, ac cum Prælatis, Magnatibus ac Proceribus ſupradictis, ſuper dictis negotiis tractaturi, veſtrumque conſilium impenſuri, & hoc ſicut nobis, &c. And in the 35 H. 6. 46. and other Books, he is called a Peer of Parliament, the which he cannot be until he ſit in Parliament, and he cannot be of the Parliament until the Parliament begin: And foraſmuch as he hath been made a Peer of Parliament by Writ (by which implicitly he is a Baron) the Writ hath not its operation and effect, untill he ſit in Parliament, there to conſult with the King and the other Nobles of the Realm; which command of the King by his Superſedeas may be countermanded, or the ſaid Edward Nevil might have excuſed himſelf to the King, or he might have waved it, and ſubmitted himſelf to his Fine; as one who is diſtrained to be a Knight, or one learned in the Law is called to be a Serjeant, the Writ cannot make him a Knight, or a Serjeant; And when one is called by Writ to Parliament, the Order is, that he be apparelled in his Parliament Robes, and his Writ is openly read in the Upper houſe, and he is brought into his place by two Lords of Parliament, and then he is adjudged in Law, Inter pares Regni, that is to ſay, ut cum olim Senatores e cenſu eligebantur, ſic Barones apud nos habiti fuerint, qui per integram Baroniam terras ſuas tenebant, ſive 13. feoda militum, & tertiam partem unius Feodi militis, quolibet Feodo computato ad 20 l. quæ faciunt 400. marcas denarii erat valentia unius Baroniæ integræ, & qui terras & redditus ad hanc valentiam habuerint, ad Parliamentum ſummoneri ſolebant; So that by this it appears, that every one who hath an entire Baropy may have of right and of courſe a Writ to be ſummoned to Parliament, for without Writ none can ſit in Parliament: And with this agree our Books, for Una voce they agree, that none can ſit in Parliament as Peer of the Realm, without matter of Record, and if Iſſue be taken, whether a Baron or no Baron, Earl or no Earl, this ſhall not be tryed Per pais, but by the Record, by which it appears, that he was a Peer of Parliament: for without matter of Record, he cannot be a Peer of Parliament, 35 H. 6. 46. 48 Ed. 3. 30. b. 48. Aſſ. pl. 6. 22 Aſſ. pl. 24. Regiſter, 287. Henricus tertius poſt magnas perturbationes & enormes exactiones inter ipſum Regem, Simonem de monte forti, & alios Barones motas & ſuſceptas, ſtatuit & ordinavit, quod omnes illi Comites & Barones Regni Angliæ, quibus ipſe Rex dignatus eſt brevia ſummonitionis dirigere, venirent ad Parliamentum, & non alii niſi forte Dominus Rex alia illa brevia eis dirigere voluiſſet: Which Act or Statute continues in force to this day, ſo that now none, although that he hath an entire Barony can have a Writ of Summons to Parliament without the Kings Warrant, under the privy Seal at leaſt.

But if the King create any Baron by Letters Patents under the Great Seal to him and to his Heirs, or to him and to his Heirs of his body, or for life, &c. there he is a noble man preſently; for ſo he is expreſly created by Letters Patents of the King, which cannot be countermanded And he ought to have a Writ of Summons to Parliament of right and of courſe, and he ſhall be tryed by his Peers, if he ſhall be arrained before any Parliament, but ſo ſhall not he be who is called by Writ, untill he ſits in Parliament, which is the diverſity.

Richard the ſecond, created John Beauchamp of Holt, Baron of Kederminſter, by Letters Patents, dated 10 Oct. 11. year of his Reign, where all others before him were created by Writ.

Trin.

Trin. 8. Jac.

IN this very Term Thomas Oldfield came out of the Court of the Dutchy, and before he came into Westminster Hall, with a knife stabbed one Ferrar, a Justice of Peace, of which he dyed: And if Oldfield should have his right hand cut off, was the question before the two chief Justices, chief Baron, Walmsley, Warberton, Foster, and divers other Justices. And it was resolved, No; for it ought to be in the Hall of Westminster, Sedentibus Curiis, as it appears in 3 Eliz. Dyer 188. 41 Ed. 3. title Coron. 280. And a Precedent was shewn, An. 9 Eliz. in Banco le Roy, where one Robert Gerling smote one in Whitehall, sitting in the Court of Requests, and was but fined and ransomed: The same Law if one smite one in the Court of the Dutchy, &c. But if one smite another before the Justices of Assise, there his right-hand shall be cut off, as it appears, 22 Ed. 3. fol. 13, and 19 Ed. 3. title Judgment. And one Bellingham, An. 2 Jac. in the Hall of Westminster, Sedentibus Curiis, with his elbow and shoulder out of malice justled Anthony Dyer of the Inner Temple, so that he over-threw him, and with his feet spurned him upon his Leggs, but did not smite him neither with his hand, nor with any Weapon: And yet it was held that his right hand should be cut off, &c. upon which Bellingham was indicted in Banc le Roy, and after obtained his pardon.

A Case was put to all the Justices of England, which was such; The Bishoprick of Waterford and Lismore, being originally two Bishopricks distinct, were by lawful authority in the Reign of H. 3. united and consolidated, but the Chapiters yet remain several: After which union the Bishop alienes Lands of the See of Waterford, and alienes Lands of the See of Lismore, with the confirmation of the Chapiter of Lismore, the Question was, whether such Alienations are not voidable by the Successor; being without the confirmations of both the Deans and Chapiters. The second Question was, whether the Queen might avoid such alienations Contra formam collationis, by Seisure, or otherwise: And the Justices demanded a view of the Union; to which it was answered, That it was not extant, then it was resolved by the Justices: that in almuch as the usage hath been after the said union, that the several Deans and Chapiters have severally made confirmations, ut supra; it shall be intended that the Union was made especially in such manner, scil. That notwithstanding the Union, yet for avoiding of confusion, and in respect of the remotenes of the Deaneries and Chapiters, that Estates made shall be severally confirmed, as before the Union, and then such confirmation shall be good, for in such case, Modus & conventio vincunt Legem: but if the Union was made generally, and the Bishop eligible by both Chapiters, then Estates made, ought to be confirmed by both the Chapiters, vide 50. Ed. 3. title Assise Statham, the time of R. 2. title Grant, 27 H. 8. Dyer 58. 11 Eliz. Dyer, 33 H. 8. cap.

It was resolved, that upon a lawful Alienation made with confirmation of the Dean and Chapiter, no Contra formam collationis lyeth upon the Statute of Westmin. 2. as hath been resolved in the seventh part of my Reports.

Trin.

Trin. 8. Jac.

Convocation. NOte, it was resolved by the two chief Justices and divers other Justices, at a Committe before the Lords in the same Parliament, divers points concerning the authority of a Convocation.

1. That a Convocation cannot assemble at their Convocation, without the assent of the King.

2. That after their assembly they cannot confer to constitute any Canons, without license del Roy.

3. When they upon conference conclude any Canons, yet they cannot execute any of their Canons without Royal assent.

4. They cannot execute any after Royal assent, but with these four limitations.

1. That they be not against the Prerogative of the King.
2. Not against the Common Law.
3. Nor against any Statute Law.
4. Nor against any Custome of the Realm.

And all this appears by the Statute 25 H. 8. cap. 19. and this was but an affirmance of what was before the said Statute, for that it appears by the 19 Ed. 3. title. Quare non admisit. 7. where it is held; that if a Canon Law be against the Law of the Land, the Bishop ought to obey the Commandment of the King, according to the Law of the Land, 10. H. 7. 17. there is a Canon that no Spiritual person shall be put to answer before a secular Judge; But this doth not bind, because it is against the common Law; And it appears by the Statute of Morton cap. 9. that they in case of Bastardy were enforced to certifie against the Law of holy Church, that Nati ante matrimonium fuerint Bastardi, quia Ecclesia habet tales pro legitimis, & rogaverunt omnes Episcopi, Magnates quod consentirent, quod qui nati fuerint ante matrimonium essent legitimi, which proves, that the Canon Law in this point being repugnant to the Law of the Land, was not of any force: And for this, they implored the aid of the Parliament, Et omnes Comites & barones una voce responderunt, quod nolumus leges Angliæ mutare, quæ huc usque usitatæ sunt & approbatæ.

2 H. 6. 13. A Convocation may make Constitutions, by which those of the Spiritual shall be bound for this, that they all, or by representation, or in person are present, but not the temporalty.

21 Ed. 4. 47. The Convocation is Spiritual, and all their Constitutions are Spiritual, vide the Records in the Tower of 18. H. 8. 8 Ed. 1. 25. Ed. 1. 11, d. 2. & 15. Ed. 2.

Prohibitio Regis ne Clerus in Congregatione sua, &c. attemptet contra jus seu Coronam: nalia, Ne-quod statuat in Concilio suo in præjudicium Regis seu legis, &c. By which it appears, that they can do nothing against the Law of the Land; for every part of the Law, be it Common Law, or Statute Law, cannot be abrogated nor altered without an Act of Parliament, to which every one shall be party, except the Spiritual Causes, or which concerns Spiritual persons, if it be against the Prerogative of the King and the Common Law.

Piracy, Trin. 8. Jac.

IN this very Term the King referred the consideration of Letters Patents of the Lord Admiral of England, to the two chief Justices, and the chief Baron, whether by the said Letters Patents, the Goods which Pirates should take from others by Robbery and Piracy did pass to the Lord Admiral, or no? And upon the consideration of the said Letters Patents it appeared to us, that he had Bona & Chattalla piratarum, and also Bona & Chattalla deprædata, id est, the Goods robbed from others: which did not pass for two Causes.

1. If the King grant Bona & Chattalla felonum, the Patentee shall have the Goods and Chattels of the Felon himself, in which he hath property; but he shall not have the Goods and Chattels which the Felon stealeth from others.

2. The Goods taken from others the King cannot grant, for it appears by the Statute 27 Ed. 3. cap. 8. St. 2. that the Merchant, &c. so robbed shall be received to prove, that the Goods and Chattels belong to him by his Chart or Cocket, or by other lawful proof of Merchants, &c. the said Goods shall be delivered without any Suit at the Common Law, which Act is general, be the Robber privy or a stranger: But it was resolved, that until such proof be made, the King may seize the said Goods; for Goods of which the property is unknown, the King may seize; And if they are Bona peritura, the King may sell them, and, upon proof, &c. restore the value. And note, the Statute doth not limit the Owner in case of depredation to any certain time to prove the property of the same Goods, as ought to be in case of Wreck, vide Stat. 31 H. 6. cap. 4. vide 2 R. 2. cap. 2. 13 Ed. 4. 9, 10. a good resolution of the Justices. And the Register 129. F. N. B. 114. when a Subject of the King, who is spoiled beyond the Seas shall have a Writ, &c. for to take Goods within England, &c.

Simony, Trin. 8. Jac.

IT was agreed ad mensam, by all the Justices and Barons in Fleetstreet, that if the Patron, for any money, present any person to any Benefice with cure, &c. that then every such presentation and the admission, institution, and induction thereupon are void, although that the Presentee be not party nor privy to it: for the Statute intends to punish the wicked avarice of corrupt exactions by the loss of his Presentation hac vice, and the Statute gives the Presentation to the Queen: And all this per verba Statuti, which is penned strongly enough against corrupt Patrons.

Proclamations, Mich. 8. Jacobi.

Proclamation cannot make that an offence which was not.

MEmorand. That upon Thursday, 20 Sept. 8. Regis Jacobi, I was sent for to attend the Lord Chancellor, Lord Treasurer, Lord privy Seal, and the Chancellor of the Dutchy; there being present the Attorney, the Sollicitor, and Recorder: And two questions were moved to me by the Lord Treasurer; the one, If the King by his Proclamation may prohibit new Buildings in and about London, &c. The other, if the King may prohibit the making of Starch of Wheat; And the Lord Treasurer said, that these were preferred to the King as grievances, and against the Law, and Justice: And the King hath answered, that he will confer with his privy Council, and his Judges, and then he will do right to them. To which I answered, That these questions were of great importance. 2. That they concerned the answer of the King to the body, viz. to the Commons of the House of Parliament. 3. That I did not hear of these questions until this morning, at nine of the Clock; for the grievances were preferred, and the answer made, when I was in my Circuit. And lastly, both the Proclamations, which now were shewed, were promulgated, An. 5 Jac. after my time of Attorneyship: And for these reasons I did humbly desire them that I might have conference with my Brethren the Judges about the answer of the King, and then to make an advised answer according to Law and reason. To which the Lord Chancellor said, That every President had first a commencement, and that he would advise the Judges to maintain the power and Prerogative of the King; and in cases in which there is no authority and President, to leave it to the King to order in it according to his wisdom, and for the good of his Subjects, or otherwise the King would be no more than the Duke of Venice; And that the King was so much restrained in his Prerogative, that it was to be feared the bonds would be broken: And the Lord privy Seal said, that the Physician was not always bound to a President, but to apply his Medicine according to the quality of the disease: And all concluded that it should be necessary at that time to confirm the Kings Prerogative with our Opinions, although that there were not any former President or Authority in Law; for every President ought to have a Commencement.

To which I answered, That true it is, that every President hath a commencement; but when authority and President is wanting, there is need of great considerations, before that any thing of novelty shall be established, and to provide that this be not against the Law of the Land: for I said, that the King cannot change any part of the Common Law, nor create any offence by his Proclamation, which was not an Offence before, without Parliament. But at this time I only desire to have a time of consideration and conference with my Brothers, for Deliberandum est diu, quod statuendum est semel; To which the Sollicitor said, that divers Sentences were given in the Star Chamber upon the Proclamation against building; and that I my self had given sentence in divers cases against the said Proclamation: to which I answered, That Presidents were to be seen, and considerations to be had of this upon conference with my Brethren, for that Melius est recurrere, quam male currere; And the Indictment concludes, Contra leges & statuta; but I never heard an Indictment to conclude, Contra Regiam Proclamationem. And at last my motion was allowed, and the Lords appointed the two chief Justices, chief Baron, and Baron Altham to have consideration of it.

Note,

Note, the King by his Proclamation, or other ways, cannot change any part of the Common Law, or Statute Law, or the Customs of the Realm, 11 H.4.37. Forteſcue in laudibus Angliæ legum, cap.9 18 Ed. 4. 35, 36.&c. 31 H.8.cap.8.hic infra: Alſo the King cannot create any Offence by his Prohibition or Proclamation, which was not an Offence before, for that was to change the Law, and to make an Offence which was not: for, Ubi non eſt lex, ibi non eſt tranſgreſſio; ergo, that which cannot be puniſhed without Proclamation, cannot be puniſhed with it, vide le Stat. 31 H. 8. cap.8. which Act gives more power to the King than he had before, and yet there it is declared, that Proclamations ſhall not alter the Law, Statutes, or Cuſtoms of the Realm, or impeach any in his Inheritence, Goods, body, life, &c. But if a man be indicted for a contempt againſt a Proclamation, he ſhall be fined and impriſoned, and ſo impeached in his body and goods, vide Forteſcue, cap.9.18.34.36,37,&c.

But a thing which is puniſhable by the Law, by fine, and impriſonment, if the King prohibit it by his Proclamation, before that he will puniſh it, and ſo warn his Subjects of the peril of it, there, if he permit it after, this as a Circumſtance aggravates the Offence; But he by Proclamation cannot make a thing unlawful, which was permitted by the Law before: And this was well proved by the ancient and continual forms of Indictments; for all Indictments conclude, Contra legem & conſuetudinem Angliæ, or contra leges & Statuta, &c. But never was ſeen any Indictment to conclude Contra Regiam proclamationem.

So in all caſes the King out of his providence, and to prevent dangers, which it will be too late to prevent afterwards, he may prohibit them before, which will aggravate the Offence, if it be afterwards committed: And as it is a grand Prerogative of the King to make Proclamation (for no Subject can make it without authority from the King, or lawful Cuſtome) upon pain of fine and impriſonment, as it is held in the 22 H. 8. Procl.B. but we do find divers preſidents of Proclamations which are utterly againſt Law and reaſon, and for that void; for, Quæ contra rationem Juris introducta ſunt, non debent trahi in conſequentiam.

An Act was made, by which Forreigners were licenſed to Merchandize within London, H. 4. by Proclamation prohibited the execution of it: and that it ſhould be in ſuſpence uſque ad proximum Parliamentum, which was againſt Law, vide dorſ. clauſ.8. H. 4. Proclamat. in London: But 9 H. 4. An Act of Parliament was made, That all the Iriſh people ſhould depart the Realm, and go into Ireland before the Feaſt of the Nativity of the bleſſed Lady, upon pain of death, which was abſolutely in terrorem, and was utterly againſt the Law.

Hollinſhead 722. An. Dom. 1546. 37 H. 8. the Whore-houſes called the Stews, were ſuppreſſed by Proclamation, and ſound of Trumpet, &c.

In the ſame Term it was reſolved by the two chief Juſtices, chief Baron, and Baron Altham, upon conference betwixt the Lords of the priby Council and them, that the King by his Proclamation cannot create any Offence which was not an Offence before, for then he may alter the Law of the Land by his Proclamation in a high point; for if he may create an Offence where none is, upon that enſues fine and impriſonment: Alſo the Law of England is divided into three parts, Common Law, Statute Law, and Cuſtome; But the Kings Proclamation is none of them: Alſo Malum, aut eſt malum in ſe, aut prohibitum, that which is againſt Law is malum in ſe; malum prohibitum is ſuch an Offence as is prohibited by Act of Parliament, and not by Proclamation.

Alſo it was reſolved, that the King hath no Prerogative, but that which the Law of the Land allows him.

But the King for prevention of Offences, may by Proclamation admonish his Subjects that they keep the Laws, and do not offend them; upon punishment to be inflicted by the Law, &c.

Lastly, if the Offence be not punishable in the Star-Chamber, the Prohibition of it by Proclamation cannot make it punishable there: And after this resolution, no Proclamation imposing Fine and Imprisonment was afterwards made, &c.

Mich. 8. Jac.

No Prohibition after the Writ *De excommunicato capiendo.*

NOte, it was resolved in the same Term, that if a man be excommunicated by the Ordinary, where he ought not to be, as after a general pardon, &c. and the Defendant being negligent doth not sue a Prohibition, but remains excommunicate by forty days, and upon Certificate in Chancery, he is taken by the Kings Writ De excommunicato capiendo, that no Prohibition lies in this case, for that he is taken by the Kings Writ, and no president or authority can be found where a Prohibition was granted after the party was taken by the Kings Writ; for Prohibition lies to prohibit Ecclesiastical proceedings, not any thing which is done by the Kings Writ by force of the Common Law; and if a Prohibition be granted, it will not deliver the party: Then it was moved, what remedy hath the party who is so wrongfully excommunicated? To which it wap answered, that he hath three remedies, viz.

1. He may have a Writ out of Chancery to absolve him; for as it is held in 14 H.4.fol.14. In all cases where a man is excommunicated by the Bishop against our Law, he shall have a Writ out of the Chancery directed to the Bishop, commanding him to assoil him: And with this agrees 7 Ed.4.14.

2. When a man is excommunicated against the Law of this Realm, so that he cannot have a Writ de Cautione admittenda, for then he ought Parere mandatis Ecclesiæ in forma Juris, id est, Ecclesiastici, where in truth it is, Excommunicatio contra jus & formam Juris, id est, communis juris: But if he shew his cause to the Bishop, and request him to assoil him, for this, that he was excommunicated after the Offence was pardoned, or for this, that the cause doth not appear to Ecclesiastical Cognizance, and he refuse to assoil him, so that he is now disabled to sue any Writ of the King, so long as he remains excommunicated, he may have an Action Sur le case against the Ordinary, who hath done him this wrong, to disable him in this case; and with this agrees the Dr. & Stud. lib.2.cap.32.fol.119.

3. If the party be excommunicated for none of the causes mentioned in the Act of 5 Eliz. cap. 23. then he may have this for plea in the Kings Bench by the same Act, and avoid the penalties inflicted by the same Act.

Note, It was resolved by the Court, &c. that where one is cited before the Dean of the Arches in cause of defamation, for calling the Plaintiff Whore, out of the proper Dioces, scil. the Dioces of LONDON against the Statute of 23 H.8. and the Plaintiff hath sentence, and the Defendant is excommunicated, and so continues eight days: And upon Certificate into the Chancery, a Writ of Excommunicato capiendo is granted, and after the Defendant is taken and imprisoned by force of it, that he shall not have a Prohibition upon the Statute 23 H. 8. for no Writ in the Register

Register extends to it, Et sententia, si quam fulminaveritis, sine dilatione revocetis, and after sentence is appealed, and Prohibition lies, as appears by the Register; But no Writ nor President can be shewn in this case, but there is a Writ in the Register called a Writ De cautione admittenda, when the Defendant is taken by the Kings Writ De Excommunicato capiendo, de parendo mandatis Ecclesiæ, and to assoil and deliver the Defendant: But note a diversity, where it appears to the Court, that the matter of the Libel is not within their Jurisdictions, as of Lay-fee, or of Lay-contract, &c. there lies a Prohibition with clause to deliver the party, for there he cannot find caution De parendo mandatis Ecclesiæ, for this, that Mandata Ecclesiæ, are contra legem & extra jurisdictionem suam: But in the case at the Bar, although it appears by the Libel, that the Defendant was of one such Parish in London, yet inasmuch as the Statute, 23 H. 8. hath many exceptions, scil. That the Ordinary request the Archbishop, &c. to examine the case, &c. so that the said defamation being the matter of the Libel, is of Ecclesiastical Cognizance, and the Statute hath many exceptions, so that it doth not appear to us judicially without information, that the Citation is against the form of the Statute; and this information comes too late in this case after the Defendant hath persisted so long in his contumacy, and is taken by the Kings Writ and imprisoned.

Admiralty.

IT was resolved per totam Curiam, that if one be sued in the Admiralty Court for a thing alledged to be done upon the high Sea, within the Jurisdiction of the Admiral, and the Defendant plead to it, and confess the thing to be done, and after sentence is given the Court will be advised to grant a Prohibition, upon Surmise, that it was done Infra corpus Comitatus, against their own confession, unless it can be made to appear to the Court by any matter in writing, or other good matter, that this was done upon the Land, for otherwise every one will stay until after sentence: And then for vexation only sue out a Prohibition; for although the admittance of the party cannot give a Jurisdiction to the Court where it of right hath none, for that it will be an encroachment upon the Common Law: yet when the Court shall be advised that this is meerly for vexation, and shall be intended for delay, if the Prohibition shall not be sued forth till after sentence; unless that he can shew good matter to the Court, to ascertain the Court that this is not for vexation, it shall not be granted. And admonition was given to them which sue forth Prohibitions, that they should not keep them by long time in their hands, and notwithstanding proceed in the Ecclesiastical Court, &c. and when they perceive that they cannot prevail, then to cast in their Prohibitions; for if they abuse that liberty to the dammage and vexation of the party, we will take such order as in case of a Writ of Priviledge, if the Defendant keep it untill the Jurors are ready, &c. it shall not be allowed.

The Court cannot grant Prohibition after sentence.

Lutch 253

Hill.

Hill. 8. Jac.

IN this very Term in the caſe of Doctor Trevor, who was Chancellor of a Biſhop in Wales, it was reſolved, that the Office of a Chancellor and Regiſter, &c. in the Eccleſiaſtical Courts, are within the Statute 5 Edw. 6. cap. 16. the words of which Statute are, Any Office, &c. which ſhall in any wiſe touch or concern the Adminiſtration or Execution of Juſtice; and the words are ſtrongly penned againſt corruption of Officers, for they are, Which ſhall in any wiſe touch or concern the Adminiſtration, &c. and the Preamble; And for avoiding of corruption, which may hereafter happen to be in the Officers and Miniſters of thoſe Courts, Places and Rooms, wherein there is requiſite to be had the true adminiſtration of Juſtice, in ſervices of truſt: And to the intent, that perſons worthy and meet to be advanced to the place where Juſtice is to be miniſtred, in any ſervice of truſt to be executed, ſhould be preferred to the ſame, and none other. Which Act being made for avoiding of corruption in Officers, &c. and for the advancement of perſons more worthy and ſufficient for to execute the ſaid Offices, by which Juſtice and right ſhall be alſo advanced, ſhall be expounded moſt beneficially to ſuppreſs corruption. And inaſmuch as the Law allows Eccleſiaſtical Courts to proceed in caſe of Blaſphemy, Hereſie, Schiſm, Incontinence, &c. and the loyalty of Matrimonies, of Divorce, of the right of Tythes, probat of Wills, granting of Adminiſtrations, &c. And that from theſe proceedings depend not only the ſalvation of Souls, but alſo the Legitimation of Iſſues, &c. and that no debt or duty can be recovered by Executors or Adminiſtrators, without the probat of Teſtaments, or Letters of Adminiſtration, and other things of great conſequence; It is moſt reaſon that ſuch Officers, which concern the adminiſtration and execution of Juſtice in theſe points, which concern the ſalvation of Souls, and the other matters aforeſaid, ſhall be within this Statute, then Officers which concern the adminiſtration or execution of Juſtice in Temporal matters; for this, that corruption of Officers in the ſaid Spiritual and Eccleſiaſtical cauſes is more dangerous, then the Officers in Temporal cauſes; for the Temporal Judge commits the party convict to the Goaler; but the Spiritual Judge commits the perſon excommunicate to the Devil. Alſo thoſe Officers do not only touch and concern the adminiſtration of Juſtice, &c. but alſo are Services of great truſt, for this, that the Principal end of their proceedings is, Pro ſalute animarum, &c. and there is no exception or proviſo in the Statute for them.

It was reſolved, that ſuch Offices were within the Purview of the ſaid Statute.

Hill.

Hill. 8. Jacobi Regis.

IT is to be understood, that the Jurisdiction of the Admiralty is more ancient then Mr. Lambert in his Jurisdiction of Courts doth affirm, for there is held an opinion in these words concerning the Admiralty; I think that the Decision of Marine causes was not put out of the Kings house, and committed over to the charge of the Admiral, until the time of Ed. 3. whereunto I am led, partly by the consideration of the time of his Reign, which was much occupied in affairs beyond the Seas, and by reason of his Wars with France, and of the intercourse and trade of Merchandize, which then flourished; and partly, for that I find no mention of the Admiralty before the Reign of R. 2. who going about by a Statute, made the thirteenth year of his Reign, to restrain the authority of that Court which had exceeded her known limits, doth take order, that it should meddle no more than it was wont to do in the time of his Grandfather Edw. 3. thereby reducing its authority, as I think, to the first Original (hoc ille): But without question the Jurisdiction of the Admiralty is more ancient than the Reign of the said King Edw. 3. For where it is said, that there is found no mention of it before the time of Edw. 3. I find a notable Book in the time of Edw. 1. title Avowry 192. which proves the Jurisdiction of the Admiralty more ancient than Mr. Lambert supposeth: The Case was, One brought a Replevin of his Ship taken on the Coast of Scarborough, upon the Sea, and carried into a County of Norfolk, and there detained: The Plaint of taking in the Coast of Scarborough, upon the Sea, which is no Town or place certain by which the Pais may be taken; for the Coast contains four Leagues. And also of a thing done at Sea, this Court cannot have Cognizances, for this Judgment is given to Marriners. Beresford who gave the Rule in the case: The King wills that the Peace be kept as well upon the Sea as upon the Land: And we find that you come by due Process, and we see nothing why you ought not to answer, upon which Book I observe five things. Admiralty?

1. That of things done upon the Sea, certain judgment is given to Marriners, id est, to Admirals, as shall appear, and that doth not belong to the Court of the King, for this, that no Pais may be taken there: And for this, that of a thing in any Town or place, where the Pais or Jury may come, there the Admiral hath not Jurisdiction.

2. This proves directly, that then the Admiral hath Jurisdiction to adjudge things done upon the Sea, from whence no Pais may come; And this did not begin then: But without question, so long as there hath been Trade and Traffick (which is the Life of every Island) there was Marine Jurisdiction to redress Depredations, Piracies, Murthers, and other Offences upon the Sea: And to determine all Contracts made there; and this doth appear by the said Beresford chief Justice (who speaks in the voice of all the Court) where he says, that the King willeth that the peace be as well kept upon the Sea as upon the Land; and it is not possible that Peace should be kept without jurisdiction of Justice.

3. The third thing to be observed is, that if part of the matter be done upon the Sea, and part in a County, that the Common Law shall have all the jurisdiction.

4. The Sea within the jurisdiction of the Admiral, is described to be out of every County, for if the Sea be within any County, then pais may come from thence, and the Admiral hath Jurisdiction where the Common Law cannot give remedy.

5. If a thing be done upon the Sea, Hors del County, the party may plead it to

to the jurisdiction of the Court: And all these points are directly without any strain collected out of the said Book.

And it is to wit, that in ancient time the jurisdiction of the Admiral was called Maritima Angliæ, and sometimes Marina Angliæ, and so the Vocabulum artis was made of an Adjective, as the office of Chamberlainship of England was granted to the Earl of Oxford of ancient time, per nomen Camerariæ Angliæ, so that Maritima Angliæ, since Marina Angliæ, signifies the Admiralship or Marinship of England: for Marinus, idem est quod θαλάσιος, that is, of the Sea, and θαλασσιάρχος, is the Admiral or general of the Fleet, and Almarath, by corruption Admiral, signifies the Governor or Captain of the Navy; and so Archigubernus signifies the Admiral or chief Governor of the Captains of the Navy, chief Captain of Mariners, Admiral of the Fleet, Admiral of the Ships, &c. sunt synonyma: And in ancient time, sometimes one was Admiral of all England, and sometimes the Office was divided; And for this Ex Rotulo Patentium de An. 6 H. 3. de Maritima Custodienda, the Letters Patents are, Dominus Rex commisit. Galfrido de Lacy Maritimam Angliæ custodiendam, quamdiu Dominus Rex placuerit, with commandment of that attendance, Ad fidem, commodum, & honorem Domini Regis. Teste apud Lond. 29 Augusti.

Ex Rotulo Patentium Anno 9 H. 3. Rex omnibus de Costera maris Norf. & Suff. salutem. Sciatis quod concessimus Richardo Agnillo Marinam Guardiam Norf. & Suff. cum omnibus pertinentiis, scil. Erewel, Oreford, Dunmervie, Gerem. & Lenn custodiendam quamdiu nobis placuerit, & ideo vobis mandamus, quod ei in omnibus, quæ ad dictam Marinam pertinent, intendentes sitis & respondentes. Teste, &c. apud West. 3. Octob. And Geffry Lacy was called Admiral of England.

Charta 15 H. 3. 28. Junii, Petrus de Rivall habet ad totam vitam suam Custodiam omnium Portuum & totius Costeræ Marinæ Angliæ cum omnibus libertatibus & liberis consuetudinibus prædict. Portuum & Costeræ Maris pertinentibus, &c. 2. pars. Patent. 25 Ed. in 14 Claus. in Dorso in 18 William Leybourne Capitaneus Marinariorum.

At this time there were two Admirals; the one had the Government of all the Fleet from the mouth of Thames versus Boream, the other from the mouth of Thames versus Occidentem 1 pars, Patent. 25 Ed. 1. 25. Martii in 9. Johannes Botetort Custos Regis portuum Maritimorum versus partes boreales, 1. pars, Patentium. 10 Ed. 2. 8 Dec. Nicolaus Kirril constituitur Admirallus del Fleet, scil. omnium Navium ab ore aquæ Thamesis versus partes occidentales. 18. Aug. Et ibid. Tho. de Drayton Admirallus ab ore aquæ Thamesis versus partes Boreales.

And so in the time of R. 2 H. 4 H. 5 H 6. during whose Reign there was likewise unus, qui fuit Admirallus Angliæ.

8 Ed. 2. Coron. 399. Where a man may see that which was done of one part, and the other of the water, &c. in that place the County may have Cognizance, and it may be tried by a Jury: which proves also, that that which may be tried by the Common Law, doth not belong to the Admirals Jurisdiction: And Stamfords Pleas of the Crown, lib. 1. fol. 51. citing this Book, says thus, viz. So this proves that by the Common Law before the Statute, &c. the Admiral shall not have Jurisdiction, unless upon the high Sea, which proves that the Admiral by the Common Law hath Jurisdiction upon the high Sea, Ex quo sequitur, that, his Jurisdiction was by the Common Law, and then it is so ancient, that the Commencement cannot be known; so that I do conclude, that his authority did not begin in the Reign of Ed. 3. as Monsieur Lambert, upon uncertain conjectures supposeth: For if the Jurisdiction had then began and been instituted, it would have appeared upon Record.

Pasch.

Pasch. 9. Jac. Regis.

IT was resolved by the two chief Justices, the chief Baron, the Attorney and Sollicitor, that the King may erect any name of Dignity, which was out before, and for that reason the King may create a Dignity, by name of Baronet, and create one to be a Baronet, to him and his Heirs Males of his body issuing.

It was resolved, that if he do not create him of some place, he shall not have an Estate tail, but Fee-simple conditional, which shall be forfeited for Felony; but if he create him Baronet of a place, then he shall have an Estate-tail, within the Statute of West. 2. and the King may grant to him and the Heirs Males of his body, precedency before Knights Baronets, Knights of the Bath, and Knights Bachelors, and also may grant precedency to their Wives, Sons, and Daughters, &c. And that he cannot create any Dignity above the Dignity of a Baronet & under the dignity of a Baron: And that the creation of this dignity of a Baronet, shall not discharge the Heir to be in Guard, as if the Heir be made a Knight, for he is not made Knight by this, for the Dignity of a Knight is not descendable.

Pasch. 9. Jac. Regis.

NOte, that in trespas and Treason, the highest and the lowest offence, there are not any accessories, but all are principal: But in case of Felony, above the sum of 12 d. there and in case of death, &c. there may be accessories, aswell before as after; in case of petit Larceny there cannot be any accessory for the smalness of the felony; Then the case is, That A. counterfeits the great Seal of England, and B. knowing that he did counterfeit it, receives him, and abets and conforts him: If B. in this case was guilty of the Treason, is the question. And it seems he is not, for although that A. by the counterfeiting be a Traytor, the accepting and comforting of him cannot make him an accessory, for that in case of high Treason there can be no accessory, and a principal he cannot be, for this, that at the time of the counterfeiting he did not know of it.; but if one before the Act done, procure one to counterfeit the great Seal, there it is high Treason; for in the Law he counterfeits the great Seal: And in the Indictment he may be charged with the Fact, viz. the counterfeiting, but so is not he who receives after the Fact, for he cannot be charged with the Fact; And in case of Trespass: he who gives consent and aid to the Trespas, is a Principal in the Trespas; And this, as to me it appears, is very apparent in reason, and agrees with our Books, as 19 H. 6. 47. b. he who is consenting and aiding to the making of false money, commits high Treason, for he is Particeps Criminis before the Fact done, but it is held in Conyers case, Mich. 13, & 14 Eliz. Dyer 296. that in the same case, if one after the act done, know of the making of false money, and receive the party, this is not Treason but misprision of Treason, for not making discovery; and with this accords 3 H. 7. 10. that it is not Treason: which diversity Stamfords Pleas of the Crown, fol. 3. hath not well observed, vide Dyer 298. vide le Stat. 27. Eliz. which made him who received a Jesuite a Felon, for by the judgment of the Parliament the receit of a Jesuite, although he be a

Traitor, is not Treason; for the Statute makes the returning of a Jesuite Treason, of which he who receives him cannot be indicted; but it is misprision for any who receives him and doth not discover, according to the resolution in Coyners case.

Pasch. 9. Jac. Regis.

Sir William Chancey's *Case.*

IN this very Term Sir William Chancey having the priviledge of this Court, and being Prisoner in the Fleet, was brought to the Bar by Habeas Corpus by the Guardian de Fleet, who returned, that the said Sir William was committed to the Fleet by force of a Warrant from the high Commissioners in Ecclesiasticall Causes: the Tenor of which Warrant follows in these words.

THese are to will and require you in his Majesties Name, by vertue of his high Commission for Causes Ecclesiasticall, under the great Seal of England, to us & others directed, by force of a statute in such case provided, that herewithall you take and receive into your Custody the body of Sir William Chancey Knight, whom we will that you keep and detain under Custody, untill further order shall be taken for his enlargement, letting you know, that the cause of his Commitment is, for that being at the Suit of his Lady convented before his Highness Commissioners Ecclesiastical for Adultery, and for expelling her from his company, and Cohabitation with another woman, without allowing her any competent maintenance, and by his own confession convicted thereof; he was thereupon by order of Court enjoyned to allow his Wife a competent maintenance, according to his ability, and to perform such Submission and other order for his Adultery, as by Law should be enjoyned him. Which expressly he refused to do, in contempt of his Majesties said Authority, to us on that behalf committed: Given at London 19 Martij 1611. subscribed,

London.

Hen. Montague, *George Overall.* *Thomas Morton,* *Zachary Pasfield.*

And it was moved by Nicolas Serjeant of Council with Sir William, that this return was insufficient, for two causes. The one for this, that Adultery ought to be punished by the Ordinary, and is not such enormous Offence that it shall be punished by the high Commissioners, upon which the Offender cannot have his appeal, or other remedy; And clearly the wife shall not sue there for Alimony, Quod fuit concessum per Coke, Warberton, and Foster, but Walmsley doubted of Adultery; for it seemed to him that this was an Offence enormous, 2. That by force of the act 1 Eliz. the high Commissioners cannot imprison the said Sir William for Adultery, not for denying Alimony to his Wife (if that was within their Jurisdiction.) And although that the words of the Letters Patents gives them power to imprison the party, yet if the act doth not warrant it, they cannot imprison him

And Doderigde, Serjeant to the King, of Council on the other side, did not defend the imprisonment to be lawfull; And it was clearly agreed by Coke, Walmsley, Warberton & Foster, that the Commissioners had not power to imprison him in this case: And Walmsley said, that although they have used by twenty years to imprison in such case without exception taken, yet when it came before them judicially, they ought to judge according to Law: And upon this Sir William Chancey was bailed: Also it was resolved Per totam Curiam, that when upon the return it doth appear, that the imprisonment is not lawful; the Court may discharge him of imprisonment, but in this case the Court thought fit rather to bail him untill the next Term, and in the mean time to attend upon the Arch bishop, and to do that which of right and reason they ought to do. Also it was resolved that the return was insufficient in form.

1. It is not shewn when the Adultery was committed

2. He was enjoyned to allow his wife a competent maintainance without any certainty; And to perform such submission and other order for his Adultery, as by the Law he shall be enjoyned, and it is all in futuro and uncertain what order they will take, and yet for the refusal they imprison him: Also they make their Warrant by force of a Commission to them and others directed, and do not say, or to any four of them, so that it may appear to the Court, that they who made the Warrant had power by the Commission; also it is said in the Warrant, that he was summoned by the order of the Court, Vide in my Treatise at large the reasons and causes for why the Commissioners (unless that it be in special cases) may sue and imprison, Vide Pasch. 42 Eliz. Rot. 1209. Ed. Thickness is imprisoned by the high Commissioners, and upon Habeas Corpus delivered by the Justices of the Common Pleas.

Pasch. 9 Jacobi Regis.

Empringham's Case, Star-chamber.

In this very Term a case was moved in the Star-Chamber upon a Bill exhibited by the Attorney general against Robert Empringham, Vice Admiral in the County of York, Marmaduke Kettlewel, one of the Marshals of Admiralty, and Thomas Harrison, one of the informers of the Court of Admiralty in the said County; and they were charged with oppression and extortion, that they had fined and imprisoned divers of the Kings Subjects in the County of York, which no Judge of the Admiralty can justifie, for that the Court is not a Court of Record, but the proceedings there are according to the Civil Law, and upon their sentence Appeal and no Writ of Error lyeth: Also the said Empringham hath caused divers to be cited to appear before him for things done in the body of the County; as for not repairing of the banks of a River, which is within the body of a County; Also for cutting of Trees upon his own soyl; and such like, which were determinable by the Common Law, and not before the Admiral, for his authority is limited to the high Sea, and is out of any County; And for these and other Oppressions and Extortions they were by sentence of the Court of Star-Chamber fined, imprisoned, and an award, that Restitution should be made, &c.

Trin. 9. Jacobi Regis.

MEmorandum, that upon Thursday before the Term of holy Trinity, all the Justices of England were by the command of the King assembled in the Council-Chamber at Whitehal, where was also Abbot, Arch bishop of Canterbury, and with him two Bishops and divers Civilians, where the Arch bishop did complain of Prohibitions to the high Commissioners out of the Common Pleas, & the delivery of persons committed by them by Habeas Corpus. and principally of Sir William Chancey; where I defended our proceedings, according to the Treatise which I made of it, and which I delivered before the high Commissioners: And after great disputation betwixt the Arch bishop and me, at last the Arch bishop said, that he had a point not yet touched upon in my Treatise, which would give satisfaction to the Lords, and to us also without question, upon which he would relie; and that was the clause of restitution and annexation, scil. And that all such Jurisdictions, Privileges, Superiorities, & Preheminences Spiritual and Ecclesiasticall, as by any Spiritual power or authority hath heretofore, or hereafter lawfully may be exercised or used, for the visitation of the Ecclesiasticall State and persons, and for reformation, order, and correction of the same, and of all Errors, Heresies, Schisms, &c. shall for ever by authority of this present Parliament be united and annexed to the imperial Crown of this Realm: And it was said, that the Kings H.8. and Ed.6. gave power by their Commissions under the great Seal to divers to impose Mulcts, &c. in Spiritual and Ecclesiasticall causes, &c. and upon this he concludes; that inasmuch as this had been used before 1. Eliz. this is given to the Queen Eliz. and her Successors: Also inasmuch as by the Statute of 2 H.4. and 2 H.7. the Jurisdiction Ecclesiastical may fine and imprison in certain particular causes Ecclesiastical, for this cause Jurisdiction to fine and imprison in all Ecclesiasticall causes is given to the King: And this he said he uttered to the intent that it may be answered; To which I for a time gave this answer, That it was good for the Weal-publick, that the Judges of the common Law should interpret the Statutes, and Acts of Parliament within this Realm; and that if such interpretation ought to be made, was absurd & against Law and reason for divers causes.

1. For that if such word (lawfully) were omited, that yet this Act, as appears by the Title and Preamble, being an Act of Restitution, ought to be intended of lawfull jurisdictions, privileges, &c.

2. These words, Heretofore hath, or hereafter lawfully may be exercised, &c. This word lawfully extends as well to times past, as to times future: And all this was affirmed by all the Justices.

3. It was said by me, that before the Statute of 1 Eliz. no Ecclesiasticall Judge may impose a Fine or Imprison for any Ecclesiastical or Spiritual Offence, unless there be authority by act of Parliament: And this was so affirmed by all the Justices, that although in some cases they may fine and imprison, that by this clause in all cases they may fine and imprison was so manifest, that it was not worthy any answer: But now I have seen the Commission made to Cromwel to be Vice-gerent, and other Commissions to others by his appointment, for this, that he was imployed in the affairs of the Kingdom, in which Commission are these words, Vide my Book of Presidents, the Commission at large.

And afterwards in this very Term the privy Council sent for the Justices of the common Pleas onely, and there the reasons and causes of the said resolution were largely debated, and opposition was made as much as might be by Egerton Lord Chancellor, but the Justices of common Pleas remained constant in their former Opinion; and afterwards the Council sent for the chief Justice of the Kings Bench, Justice Williams, Justice Cook, Tanfield chief Baron, Snig, Altham, and Bromely, who were not acquainted with the reasons and causes of the said Rule of the common Pleas; nor did they know for what cause they came before the Council; and hearing the Lord Chancellor affirm, that the high Commissioners have always by Act 1 Eliz. imposed Fines and Imprisonment for exorbitant Crimes (without any conference with us) were of a suddain Opinion with us, without any conference amongst themselves, & without hearing of the matter debated: And after at another day this very term, the said Judges of the Kings Bench, Barons of the Exchequer, and Justice Fenner and Yelverton, who were omitted before, and We the Justices of the common Pleas were commanded to attend the privy Council; And when we all were assembled, we of the common Pleas were commanded to retire, for that, as the Lord Treasurer said, we had contested with the King; and in our absence the King and the Prince sate with the Council, and then the Justices of the Kings Bench and Barons of the Exchequer, were seriatim with the Council: And the King demanded their Opinions in certain points concerning the high Commission, with which they were not acquainted before, which were not related to us. In all which as appears, after they were not unanimously agreed and after two hours and a halfe, we the Justices of the Bench, Coke, Walmsly, Warberton, and Foster, were commanded to come before the King, the Prince, and the Council, where the King declared, that by the advice of the Council, and by the advice of the Justices of the Kings Bench, and Barons, he will reform the high Commission in divers points, and reduce it to certain Spiritual causes, the which after he will have to be obeyed in all points: And the Lord Treasurer said, that the principal Father was pluckt from the high Commissioners, and nothing but stumps remaining; and that they should not intermeddle with matters of importance, but of petit Crimes; and this word (Errors) being general, shall be explained, and no Obligations shall be taken of the parties, as before absurdly and unjustly (as he said) had been taken; and divers other things were reformed, as he said, but he did not declare them in particular.

To which it was said by me to the King, that it was grievous to us his Justices of the Bench, to be so severed from our Brethren, the Justices and Barons, but more grievous that they differed from us in Opinion, without hearing one another; and especially forasmuch as we have proceeded in the case of Sir William Chancey, and other cases concerning the power of the high Commissioners in imposing of Fines and Imprisonment judicially in open Court, upon argument at the Bar and the Bench, where it was resolved by us, that the high Commissioners cannot fine & imprison, but in certain cases; and the judicial course ought to be judicially reversed; But I said to the King, that when we the Justices of Common Pleas see the Commission newly reformed, we will, as to that which is of right, seek to satisfie the Kings expectation; and so we departed without any demand of our Opinions.

Trin. 9. Jac. Regis.

Stockdales Case in the Court of Wards.

THe King by his Letters Patents, dated 9. April. the ninth year of his Raign, granted, assigned and set over to William Stockdale, in these words.

Such and so many of the Debts, Duties, Arrerages, and Sums of Money, being of Record in our Court of Exchequer, Court of Wards and Liveries, Court of the Dutchy of Lancaster, or within any other Court or Courts within this our Realm of England, or being of Record in any of our said Courts, &c. in any year, or several years from the last year of the Reign of H. 8. untill the thirteenth year of our late Dear Sister, as shall amount to the Sum of a thousand pound, to have, take, levy, recover, and enjoy the said Debts, Duties, Arrerages, and Sums of Money amounting unto the Sum of a thousand pound, before in and by these presents given and granted to tha said William Stockdale, his Executors, Administrators, and Assignes.

And in this case divers points were resolved.

1. That the said Grant of the King is void for the uncertainty, for by the Grant no debt in certain may pass; & if it cannot pass by the Grant at the beginning, it shall never pass, as this case is: As if the King hath a hundred acres of Land in D. and he grants to a man twenty acres of the Land in D. without any describing of them by the Rent, or Occupation, or name, &c. this Grant is void, and in the case of the King, the Patentee shall not have his election, as he shall in the case of a common person; but in case of the King, if the twenty acres are described, or by abuttals, or by name certain in the particular, this is good demonstration which twenty acres shall pass.

2. Where the Patentee claims by force of this word Arreragia, to have arrerages of Rents, Reliefs, and mean Rates of Lands, &c. in the Court of Wards, &c.

It was resolved clearly, that he shall not have them, if the Patent had not gone further; for inasmuch as this word Arraerages is coupled with these words, Debts, Duties, and with these words subsequent (Sums of Money) it shall be intended of arrerages of things personal, and not of things real, as of arrerages of accompt of Moneys delivered in Prest, &c.

But the Proviso in the end of the Patent, scil. Provided alwaies, that the said William Stockdale shall take no benefit by any means of arrerages of any Rents, Reliefs, Tenths, or annual Payments whatsoever, untill Sir Patrick Murrey and others be satisfied and paid the Sum of 10000 l. &c. hath well explained what arrerages the King intended, viz., of Rents, &c. and so to construe one part of the Patent by the other; But clearly mean Rates are not within the said words, for they are the profits of demesn. Land.

Trin.

Trin. 9. Jac. Regis.

DIvers men playing at Bowls at great Marlow in the County of Kent, two of them fell out, and Quarrelled the one with the other, and a 3d. man who had not any Quarrel, in revenge of his friend, struck the other with a Bowl, of which blow he dyed; This was held Man-slaughter, for this, that it happned upon a suddain motion in revenge of his friend. Man-slaughter.

In the very same Term a special Verdict, being divers years past found in the County of Hereford, the effect of which: That two Boyes combating together, the one of them was scratched in the Face, and his Nose voided a great quantity of Blood, and he so run three quarters of a mile to his Father, who seeing his Son so abused, and the Blood run from him, and his Clothes and Face all Bloudy, he took in his hand a Cudgell, and went three quarters of a mile to the place where the other Boy was, and struck him upon the head, upon which he dyed. And this was held but Man-slaughter, for the ire and passion of the Father was continued, and there was no time that the Law can determine that it was so settled, that it shall be adjudged in Law, Malice prepense; and this case was moved ad mensam &c.

Mich. 9. Jac. Regis.

MEmemorandum, that upon Thursday in this Term, a high Commission in Causes Ecclesiastical was published in the great Chamber of the Arch bishop at Lambeth in which I with the chief Justice, chief Baron, Justice Williams, Justice Crook, Baron Altham, and Baron Bromley, were named Commissioners, among all the Lords of the Council, divers Bishops, Attorney, and Solicitor, and divers Deans and Doctors of the Canon and civil Lawes; and I was commanded to sit by force of the said Commission, which I refused for these causes. High Commission

1. For this; that I, nor any of my Brethren of the common Pleas were acquainted with the commission, but the Judges of the Kings Bench were.

2. That I did not know what was contained in the new Commission, and no Judge can execute any commission with a good conscience without knowledg; and that alwayes the gravity of the Judges hath been to know their commission, for Tantum sibi est permissum, quantum commissum: And if the commission be against Law, they ought not to sit by vertue of it.

3. That there was not any necessity that I should sit, who understand nothing of it, so long as the other Judges were there, the advice of whom had been had in this new Commission.

4. That I have indeavoured to inform my self of it, and have sent to the Rolls to have a copy of it, but it was not enrolled.

5. None can sit by force of any commission, untill he have took the Oath of Supremacy; according to the Statute of 1 Eliz. And for this, if they will read the commission so that we may hear it, & have a copy to advise upon it, then I will either sit or shew cause to the contrary. But the Lord Treasurer

Treasurer would for divers reasons perswade me to sit, which I utterly denied.

And to this the chief Justice, chief Baron, and some others of the Judges seemed to incline, upon which the Lord Treasurer conferred in private with the Arch bishop Bancroft, who said to him, that he had appointed divers causes of Heresie, Incest, & enormous Crimes to be heard upon this day, and for that he would proceed; but at last he was content that the Commission should be solemnly read, and so it was, which contained three great Skins of Parchment, and contained divers points against the Laws & Statutes of England: And when this was read, all the Judges rejoyced that they did not sit by force of it: And then the Lords of the Council, viz. The Arch bishop, the Lord Treasurer, the Lord privy Seal, the Lord Admiral, the Lord Chamberlain, the Earl of Shrewsbury, the Earl of Worcester, with the Bishops, took the oath of Supremacy and Allegeance, and then we as Commissioners were required to take the Oath, which I refused untill I had considered of it: But as the Subject of the King, I and the other Judges also took the Oath of Supremacy and Allegeance.

Then the Lord Arch bishop made an Oration in commendation of the care and providence of the King for the peace and quiet of the Church: Also he commended the Commissioners, also the necessity of the Commission to proceed summarily in these daies, wherein sins of detestable nature, and Factions, and Schisms did abound, and protested to proceed sincerely by force of it, and then he caused to be called a most blasphemous Heretick, and after him another, who was brought thither by his appointment, to shew to the Lords and the Auditory the necessity of that Commission.

And after, the Arch bishop came to the chief Justice and to me, and promised us, that we should have a Copy of the Commission, & then I should observe the diversity between the old Commission & this; and all the time that the long Commission was in reading, the Oath in taking, and the Oration made, I stood and would not sit, as I was required by the Arch bishop and the Lords, and so by my example did all the rest of the Justices.

And the Arch bishop said, that the King had commanded him to sit by vertue of this new Commission, in some open place, and at certain daies: And for that cause he had appointed the great Chamber at Lambeth in Winter, and the Hall in the Summer; and every Thursday in the Term time, at two of the Clock in the after-noon, and in the fore-noon, he would have a Sermon for the better informing of the Commissioners of their duty, in the true and sincere execution of their duties.

Mich. 9 Jacobi Regis.

IN this same Term the Issue in an Information upon the Statute 2 H. 6. 15. was tryed at the Bar, and upon the evidence upon the words of the said Act, which are that every person which setteth or fastneth in the River of Thames, any Nets or Engines called Trincks, or any manner of Nets, to any Polls, Boats, Anchors, or the like thing, to stand continually day and night, forfeiteth to the King a hundred shillings, for every time, &c. and the Defendants having set and fastned Nets called Trincks, in the River of Thames, &c. to Boats day and night, for so long time as the Tide did serve, and not continually.

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The question was, if this was within the Statute. And it was clearly resolved, that it was within the Statute; for the Nets called Tinckes, cannot stand, but for so long as the Tide serves: And for this, the word Continually shall be taken continually so long as they may stand to take Fish, and as the time of fishing endures, be it in the day or night, for Lex non intendit aliquid impossibile, for otherwise the Law should not be of any effect: And although that it was said, that this Statute remains in force, and if any had complained of any offence against it, he shall be punished, but the reason for why no execution hath been made of this Act, was for this, that none shall have benefit by the Suit but the King only, for the penalty is only given to the King. And as it doth appear by the Preamble, and in the Proviso in the Act, the manner of the Nets was not the cause of the making of the Act, for by the Proviso every man may fish in his seasonable time with Tincks, if they are of Assize, drawing and conveying them with their hands, as other Fishers do, and not fastning them to Posts, Boats, or Anchors, &c. continually to stand; for the mischief was, by fastning them, and the standing of them continually, the brood and fry of Fish were destroyed, and disturbance made to common passage of Vessels, as Weres, Tides, and other Engines.

Mich. 9. Jacobi Regis.

Shulter's Case in the Star-Chamber.

IN Camera Stell. the Case was such; John Shulter of Wisbich of the age of 115 years had Issue John his eldest Son, and others, viz. Christopher, Richard, &c. and being seised of Lands in Fee of the value of a hundred Marks per annum, his eldest Son being dead, and his Grand-child John being within age, he intended, and so gave direction to make a Lease of a Farm called Nousshall to Christopher during the minority of his Grand-child, rendring the ancient Rent, with power of Revocation: and of Lands in Yatsbury to the said Richard, in the same manner, and for the same time: and Christopher and Richard by the Covin and aid of one Woodroof a Scrivener, 24 Eliz. drew and ingrossed two several Leases of the Premisses severally to Christopher and Richard, for one and fifty years, tendring but four pence per annum, and without any power of Revocation: And John Shulter the Grand-father could read and write very well, but by reason of his great Age was blind; and Woodroof declared to him, that the effect of the said Leases were in all points according to his direction: And upon this the said John Shulter, the Grand-father, sealed and delivered as his Deeds.

And it was resolved by the Lord Ellesmere Chancellor, and by the two chief Justices, that the said Indentures could not bind the said J. Shulter, for this, that he was blind, and like to one who could not read at all; and that the effect being declared unto him in other manner than in truth the Indentures were; It did fully agree with Manfers Case in the second part of my Reports, fol. 4.

N Mich.

Mich. 9. Jac. Regis.

Sir Anthony Aſhley's *Caſe*.

Conſpiracy. BEtwæn Sir Anthony Aſhly Knight, Plaintiff, and Sir James Creighton, Knight, Hercules Hunnings, John Cantrell Servant of Hunnings, Thomas Hampton, Archibald Sterling, Servants to Sir James Creighton, Henry Smith, Mary Rice, and divers others Defendants, the Caſe was thus: Sir James Creighton had bought a pretended right of and in the Mannor of Lyddy and Milliſent, and divers other Lands of which Sir Anthony had long poſſeſſion; upon which divers motions were made concerning Fines acknowledged to be ſtaid, &c. in the Common Bench, and Sir James Creighton not prevailing in it, and Sir Anthony (for divers miſdemeanors only, heard before the Lords of the Council, at the Council Table, being diſcharged to be one of the Clerks of the Council, and in great diſgrace) he entred into a wicked and damnable Conſpiracy with the other Defendants, to accuſe the ſaid Sir Anthony of ſome hainous and capital Crime, by which he ſhould forfeit all his Land to the value of two thouſand Marks per annum, and his Goods and Chattels to a great value, which they ſhould ſhare amongſt them: And in the end, Henry Smith, who had been the Servant of Sir Anthony, was ſuborned by the ſaid Sir James, and others, to accuſe the ſaid Sir Anthony of the Murther of one William Rice, who was the Husband of the ſaid Mary Rice, one of the Defendants, which William Rice was dead above eighteen years before, upon ſurmiſe made by Sir James Creighton, that after the Attainder of Sir Anthony Aſhley, Smith ſhould have a Portion of five hundred pounds in money; and that Sir James ſhould procure of his Uncle, the Captain of the Guard, a place of the Guard in Ordinary, and procure the King to grant protection to the ſaid Smith againſt his Creditors, and a general pardon of all Offences, but he would not make any accuſation of the ſaid Sir Anthony until he had aſſurance of it; And upon this, Articles by writing Indented were drawn and ingroſſed by one Thomas Wood, a Scrivener, who dwelt in an obſcure place about the Tower, made between Sir James Creighton of the one part, and the ſaid John Cantrell, Servant to Hunnings, by the conſent of Smith, and to his uſe, on the other part, by which Sir James covenanted, That the ſaid John Cantrell and his Heirs, after the conviction and attainder of Sir Anthony Aſhley, ſhall have the ſixth part of his Mannors, Lands, Tenements and Hereditaments, Goods and Chattels in ſix parts to be divided, in conſideration that Cantrell covenanted, &c. that he ſhould procure Witneſſes to convict the Plaintiff of Murther, or other Capital Crime, and to deliver to Sir James Creighton a true particular of all the Lands, Goods and Chattels of Sir Anthony, which Articles were ſealed and delivered by Sir James Creighton, 16. Feb. Ann. 7 Jac. And at the ſame time he was bound to Cantrell in an Obligation of eight thouſand pound for performance of the ſaid Articles, and after, within two days after the ſaid Articles were ſealed and delivered, Henry Smith counterfeited himſelf to be ſick, and then he revealed the ſaid Murther in diſcharge, as he pretended, of his Conſcience, and accuſed himſelf of poyſoning the ſaid William Rice, by the commandment of the ſaid Sir Anthony Aſhley, ſo that he himſelf was the Principal, And upon this Sir James Creighton procured the ſaid Mary Rice, late the Wife of the ſaid William Rice, to preſer a Petition to the King, importing the Accuſation aforeſaid: the King referred the Petition to the chief Juſtice of the Kings Bench, to examine

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the Cauſe and the Witneſſes on both ſides, the which he did, and certified the King that he had found a falſe Conſpiracy, to indict Sir Anthony without any juſt ground; and certified alſo the effect of the ſaid Articles, upon which the King after conference with his privy Council, and by their advice thought the matter neceſſary to be heard and ſentenced in the Star-Chamber; the which matter upon ordinary proceedings was heard by ſix days in the very ſame Term: And it was objected by the Councel of the Defendants, that the Bill upon the ſaid Conſpiracy did not lye, and that it ſhould be dangerous to maintain it; for if it ſhould be lawful for every one who is accuſed, or was in fear to be accuſed of any Capital Crime, to exhibit his Bill in this Court againſt the Accuſer and all the Witneſſes, and by many captious and intricate Interrogatories ſeverally to examine them, to find contrariety in them in circumſtances; This will deterr men to proſecute againſt great Offenders, and thence great Offences will paſs unpuniſhed, which will be dangerous to the Weal publick: and by the Law Conſpiracy lies when a man is indicted, and *Legitimo modo acquietus*; but here he was never indicted, and for that it may be, that Sir Anthony is guilty of the ſaid Crime, and then are all mouths ſtopped to ſay the contrary.

But to that it was anſwered and reſolved by the Lord Chancellor, the two chief Juſtices, and all the Court, that in this caſe the Bill was maintainable, although that the party accuſed was not indicted and acquitted before, as it was reſolved in this Court, Hill. 8 Jac. in Poulters caſe, and for the reaſons and cautions there expreſſed; Alſo in this caſe at the Bar, be Sir Anthony guilty or not guilty of the ſaid Murther, yet the Defendants are puniſhable for the great and hainous miſdemeanor and conſpiracy, ſcil. for promiſing of the ſaid Bribes and Rewards to ſuborn the ſaid Henry Smith to accuſe the Plaintiff of the ſaid Murther eighteen years paſſed, and the Articles in writing to ſhare and divide the Eſtate of Sir Anthony after the Attainder; for this corrupt Conſpiracy, and great and perilous practice and miſdemeanor, the Defendants ſhall be puniſhed, let Sir Anthony be guilty or not of the ſaid Crime. And it is a great indignity offered to the King, for any Subject to preſume to covenant or aſſume, that the King ſhall grant protection or pardon, or that the Eſtate of any man ſhall be ſhared and divided, before his Attainder.

So that although that the Court will not enter into the examination of the Crime, yet it appears by the Teſtimony of a great number of Witneſſes, that the ſaid William Rice did not die of any poyſoning, but of another horrible diſeaſe, that he had got by his wicked and diſſolute life, which with reverence cannot be ſpoken. Le grand Pox.

And in this caſe it was reſolved, that if Felony be done, and one hath ſuſpicion upon probable matter that another is guilty of it, becauſe that he had part of the Goods robbed, and is indigent, or of evil fame; or if the party be indicted; or if Murther be committed, and one is ſeen near the place, or coming with a Sword or other Weapon embrued with blood, or that he was in company of Felons, or hath carried the goods ſtollen to obſcure places, or ſuch like things, theſe are good cauſes of ſuſpicion, and by reaſon of this he may arreſt the party ſo ſuſpected, to the end that he may ſubject him to Juſtice.

But in this caſe theſe three things are to be obſerved:

1. That a Felony be done.
2. That he that doth arreſt, hath ſuſpicion upon probable cauſe, which may be pleaded and is traverſable.
3. That he himſelf who hath the ſuſpicion arreſt the party.

For he cannot command another to do it, for ſuſpicion is a thing individual and perſonal, and cannot extend to another perſon than to him who hath it.

Also it was resolved, that if Felony be done, and the common fame and voice is that one hath committed it, this is good cause for him who knows of it to arrest the party, to the intent that he may be brought to Justice; but none can arrest the party suspected by the command of him who hath the suspicion, and with this agrees the Book in 2 H. 7. 15, 16. 15 H. 7. 5. 20 H. 7. 1, 2. 21 H. 7. 28. 7 Ed. 4. 20. 8 Ed. 4. 27. 11 Ed. 4. 4, 6. 17 Ed. 4, 5, 6. 20 Ed. 4. 6. b. 7 H. 4. 25. 27 H. 8. 23. 26 H. 8. 9. 7 Eliz. Dy. 226.

Hill. 9. Jac. Regis.

Breve de Heretico comburendo *lieth not at this day, &c.*

IN this very Term, the Attorney and Sollicitor consulted with me, if at this day upon conviction of an Heretick before the Ordinary, this Writ De Heretico comburendo lieth; and it seems to me clearly that it doth not, for the reasons and authorities that I have reported, Trin. 9. Jac. fol. 73. And after they consulted with Fleming chief Justice, Tanfield chief Baron, Williams, and Crook; and they upon the report of Dr. Cosins, mentioned in my said Report, and upon certain Presidents which passed in the time of Queen Elizabeth, upon former Presidents, although the Statute of 2 H. 4. was enforced, and without consideration (as I have heard) of the Authorities cited by me in my said Report, they certifie the King, that a Writ de Heretico comburendo lieth upon a conviction before the Ordinary, but that the most convenient and sure way was to convict the Heretick before the high Commissioners.

Pasch. 10. Jac.

The Lord Vaux's Case.

IN this Term, the Lord Vaux was indicted of a Premunire in the Kings Bench upon the new Statute, for refusing the Oath of Allegiance, and upon this he was arraigned, and prayed that he might be tried per pares.

But it was resolved, that he shall not in this case be tried by his Peers for the Statute of Magna Charta, cap. 29. Nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, is only to be understood of Treason, Misprision of Treason, Petit Treason, and Felony, and of Accessories to them, &c. But Premunire is but a Contempt, and Pardon of all Contempts pardons it; and for this cause it shall not be per pares.

And upon this the Lord Vaux did confess the Indictment, vide Lamb. Inst. del pace 520. Dallisons Report accordingly: That of Riots, Routs, unlawful Assemblies, &c. a Peer of the Realm shall not be tried per pares, vide Stamford, &c.

Trin.

Trin. 10. Jac.

Countess of Shrewsbury's Case.

IN this Term, before a select Council at York-House, scil. The Lord Chancellor, the Archbishop, the Duke of Lenox, the Earl of Northampton, Lord privy Seal, the Earl of Suffolk, Lord Chamberlain, the Earl of Worcester, the Earl of Pembroke, Viscount Erskin, Viscount Rochford, the Lord Zouch, the Lord Knolls, the Lord Wooton, the Chancellor of the Exchequer, the Chancellor of the Dutchy, Fleming chief Justice of the Kings Bench, Philips Master of the Rolls, Coke chief Justice of the Common Pleas, and Tanfield chief Baron. Contempt.

The Countess of Shrewsbury (the Wife of Gilbert, Earl of Shrewsbury) then Prisoner in the Tower was brought before the said Lords, and by the Attorney and Sollicitor of the King, was charged with a high and great contempt of dangerous consequence; for they declared that the Lady Arbella being of the Blood-Royal, had married Seymer, second Son of the Earl of Hertford, without privity or assent of the KING, for which contempt the said Seymer was committed to the Tower, and had escaped and fled beyond the Seas; the Lady Arbella being under restraint escaped also, and embarqued her self upon the Sea, and was taken before she got over; of which flight of the said Lady Arbella, the said Countess being her Aunt, very well knew and abetted, as is directly proved by Crompton, and not denied by the Lady Arbella: And admit it, that the Lady Arbella had no evil intent against the King (who had always a great and special care of her, and was very bountiful unto her, until her marriage with the said Seymer, which was the Pomum vetitum) yet when she fled, and when she should be invironed with evil Spirits, Cum perversis perverti possit, and when she shall be in another Sphere, she will move with the same Orb.

And the Lords of the privy Council knowing the Arcana imperii, did shew divers perilous consequences, and the rather for this, that the said Countess is an obstinate Popish Recusant, and, as was said, perverted also the Lady Arbella.

Now the Charge was in two points:

1. That the said Countess of Shrewsbury, by commandment of the King, being called to the Council Table, before the Lords of the Council at Whitehall, and there being required by the Lords to declare her knowledge touching the said points, and to discover what she knew concerning them, for the safety of the King and quiet of the Realm, she answered, that she would not make any particular answer; And being again asked by the Kings command, by the Council at Lambeth, and being charged again to answer to the said points, she refused, for two causes:

1. For that she had made a rash vow, that she would not declare any thing in particular touching the said points; and for that (as she said) it was better to obey God than Man.

2. She stood upon her privilege of Nobility, scil. To answer only when she was called judicially before her Peers, for that such privilege was allowed (as she said) to William Earl of Pembroke, and to the Lord Lumley.

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2. The second point of her charge was, that when such answer which she had made was put in writing, and read to her, yet she refused to subscribe to it; which denial to discover and discharge her conscience in a case which toucheth the safety of the King and quiet of the Realm, was urged by the Kings Council to be a great and high contempt; and that Nobility hath not any such priviledge as is alledged, nor any such allowance as was supposed; and that rash and illegal Vows make not an excuse; and that this President being now upon the Stage, was of very dangerous consequence: And the said Countess hearing the charge, yet persisted in her obstinate refusal, for the same reasons and causes upon which she had insisted before: And the Lord Chancellor began, and the Arch-bishop, and all the other Lords began with the first, and adjudged it a great and high contempt; and the Lord Chancellor said, that that was against the Law of England, with which all the Lords agreed.

And that no such allowance was given to the said Earl of Pembroke, or to the Lord Lumley in respect of their priviledge of Nobility, but that they were Voces populi, & ideo non audiendæ: And the Lord Archbishop principally proved, that as well the contempt, as the said rash Vow was against the Law of God, which he and the Earl of Northampton principally proved by divers Texts and Examples in holy Scripture.

And the effect of all that which the three Justices said, was, that after the Sentences of all the learned, prudent, and honourable Personages and Councellors of Estate, they might well be silent; but in regard that Silentium in Senatu est vitium, they would speak something, briefly, viz.

That three things in this case are to be well considered:

1. Whether the refusals aforesaid of the said Countess were Offences in Law against the King, his Crown and Dignity.

2. What manner of proceeding this is, and whether it was justifiable by President or Reason.

3. What is the demerit of the Offences, and how punishable.

As to the first, it was resolved by the Justices and Master of the Rolls, that the denying to be examined was a high and great contempt in Law, against the King, his Crown and Dignity; and that if it should be permitted, it would be an occasion of many high and dangerous Designs against the King and the Realm, which cannot be discovered; and upon hope of Impunity it will be an encouragement to Offenders, as Flemming Justice said, to enterprize dangerous attempts.

And the Master of the Rolls said, that it was not any priviledge of Nobility to refuse to be examined in this case, no more than to any Subject.

Also, if one that is Noble, and a Peer of the Realm, be sued in the Star-Chamber, or in Chancery, they ought to answer upon their Oaths, and may be examined in the Star-Chamber upon Interrogatories upon their Oaths: And if one who is Noble be produced as a Witness between party and party, he ought to be sworn, or otherwise his Testimony is of no value; and so is the common experience in the said Courts: And the chief Justice said, that forasmuch as where Order is neglected, confusion will follow, he would recite some of the honourable Priviledges which the Law of England (more than any other Law) attributes to the Nobility of England in legal proceedings; and they will not be impertinent, but give a great light to the case now in hand.

1. If a Baron, Viscount, Earl, or other Lord of Parliament and Peer of the Realm be Plaintiff in any action, and the Defendant will plead that the Plaintiff is not a Baron, Viscount, Earl, &c. as he is named in the Writ, this shall not be tried at the Common Law by Jury, who may

may be corrupted, nor by Witnesses, as in the Star-chamber or Chancery, who may be suborned; but it shall be tried by the Record in Chancery, which imports by it self solid truth; so great regard hath the Law to the trial of their Honour and Dignity, &c.

2. Their persons have many Honourable Priviledges in Law:

1. At the Suit of a Subject their bodies shall not be arrested; neither Capias nor Exigent lieth against them.

2. For the Honour and Reverence which the Law gives to Nobility, their Bodies are not subject to Torture *in Causa criminis Læsæ Majestatis.*

3. They are nor to be sworn in Assizes, Juries, or other Inquests.

4. If any Servant of the King, named in the Chequer Roll, compass or intend to kill any Lord of Parliament, or other Lord of the Kings Council, this is Felony.

5. In the Common Pleas, a Lord of Parliament shall have Knights returned on his Jury.

6. He shall have day of Grace.

7. A Lord of Parliament shall not be tried in case of Treason, Felony, or Misprision of them, but by those who are Noble and Peers of the Realm.

8. In trial of a Peer, the Lords of Parliament shall not swear, but they give their Judgment *Super fidem & ligeantiam Domino Regi debitam*, so that their faith and allegiance stands in equipage with an Oath in the case of a common person in trial of Life: And the Writs of Parliament directed to the Lords of Parliament, are *Sub fide & ligeantia, &c.* And the reason and cause that the King gives them many other Priviledges is for this, because all Honour and Nobility is derived from the King as the true Fountain: And the King honours with Nobility, for two causes.

1. *Ad consulendum*, and for that reason he gives them a Robe.

2. *Ad defendendum Regem & Regnum*, and for that cause he gives them a Sword.

And forasmuch as they derive their Dignities, accompanied with all those Honourable Priviledges from the King, to deny to answer, being required thereto by the King, to such points as concern the safety of the King and quiet of the Realm, is a high contempt and disobedience, accompanied with great ingratitude.

This denial is contra Ligeantiam suam debitam, against the faith and allegiance of a person Noble, due to the King, and which the Law greatly esteems.

And that this denying is against her faith and allegiance, appears by the ancient Oath of Allegiance, which is imprinted in the heart of every Subject, scil. Ero verus & fidelis, & veritatem præstabo Domino Regi de vita & membro & de terreno honore, & vivendum & moriendum contra omnes gentes &c. Et si cognoscam aut audiam de aliquo damno aut malo, quod Domino Regi evenire poterit quod non revelabo, &c. And this Oath of Allegiance is common to all Subjects, as well those of the Nobility as Commonalty: But the Law hath greater account of the Faith and Allegiance of a Noble

Noble man, than of one of the Commons, for this, that the breach of their Allegiance is more dangerous to the King and Estate, for Corruptio optimorum est pessima; and for this reason, the Countess by her allegiance was bound, without being demanded, to reveal to the King what she knows concerning the Premisses, upon which great mischief may happen to the King and the Realm. But being commanded by the King to declare her knowledge, the denying of it doth greatly aggravate the Offence.

Qui contemnit præceptum, contemnit præcipientem.

Command and Obedience are the ligament of Government, and Ligeantia est Legis essentia; for without Allegiance and Obedience the Law cannot proceed.

As to the second point, viz. concerning the manner of his proceeding.

Vide the Earl of *Essex* Case, 42 & 43 *Eliz.* 424.

1. Privative, it is not to fine and imprison; or inflict corporal punishment upon the Countess; for fine and imprisonment ought to be assessed in some Court judicially.

2. Positive, the Fine is Ad monendum, or at the most Ad minandum; it is ad instruendum, non ad destruendum.

This selected Council is to express what punishment this Offence justly deserved, if it be judicially proceeded within the Star Chamber; for which reason this manner of proceeding is out of the mercy and grace of the King against this honourable Lady, that she seeing her Offence may submit her self to the King without any punishment in any Court judicially.

If Sentence shall be given in the Star Chamber according to Justice, you the Lords shall be Agents in it; But in this manner according to the mercy of the King, the King is only Agent: the Law hath put Rules and Limits to the Justice of the King, but not unto his mercy; that is, transcendent and without any limits of the Law; Et ideo processus iste est regalis plane & Rege dignus.

Also inasmuch as the allegiance and obedience of the Subject is the best flower in his Imperial Garland, to the intent that it may neither be blasted, nor impaired by this dangerous example, to the prejudice of his Royal Prerogative and Posterity, this Proceeding hath been thought necessary: And this is fortified by the President of the Earl of Essex, against whom such proceedings were in this very place, An. 42 & 43 Eliz. Reg.

And as to the last point it was resolved by all quasi una voce, that if a Sentence should be given in the Star Chamber judicially, she should be fined twenty thousand pound, and imprisoned during the Kings pleasure.

Trin. 10. Jac. Regis.

Robert Scarlet's Case.

NOte, that at Sessions of Peace held lately at Woodbridge in the County of Suffolk, the Sheriff returned a grand Inquest, of which one Robert Scarlet, in the County of Suffolk had requested to be one, but the Sheriff, knowing the malice of the man, refused to return him; but notwithstanding by Confederacy with the Clerk who read the Pannel, he was sworn of the Grand Inquest, and was not returned by the Sheriff; and being amongst them of the Grand Inquest, and as one of them, of his malice, and upon his own knowledge, as he pretended (to whom the rest gave credit) indicted seventeen honest men, upon divers penal Laws; and some of the Justices looking over the Bills, found by the Grand Inquest, and perceiving so many honest men to be indicted, as they did think, maliciously, demanded of them of the Inquest, what evidence they had to find the said Bills, and they answered, By the testimony and Cognizance of one of themselves, scil. of Robert Scarlet: And upon examination it did appear, that the said Robert Scarlet was not returned, but that he by confederacy betwixt him and the Clerk, procured himself to be sworn of the said Grand Inquest, with intent to indict his Neighbours maliciously, for which offence he was indicted at Sumner Assizes, A. 10 Jac. held at Bury, upon the Statute 11 H.4.cap.9. by which it is provided that no Indictment shall be found by any persons named to the Justices, without due return of the Sheriff, but by inquest of lawful Liege people of the King, in such manner as was used in the time of his Noble Progenitors, returned by the Sheriff, &c. without any denomination, &c. And if any Indictment be made hereafter in any point contrary, that the Indictment shall be void, and for ever held Nul.

And upon this Act of 11 H.4. the said Robert Scarlet was indicted, and he pleaded Not guilty. And all the especial matter aforesaid was proved in evidence; and upon this he was found guilty by a substantial Jury: and in this case consideration was had of divers points.

1. Whether the Justices of Assize have power to punish this Offence, or no; and it was held affirmatively, scil. by force of their Commission of Oyer and Terminer, for that the said Commission gives them power Ad inquirendum inter alia de omnibus falsitatibus, negligentiis, &c. & aliis malefactis, offensis & injuriis quibuscunque, and of them to hear and determine; and this is understood as well of offences against an Act of Parliament, as against the Common Law; And for that that it is commonly used, that Indictments of non-residency of Parsons, Vicars, &c. upon the Statute of 21 H.8. are taken before the Justices of Assize, by force of this word in the said Commission of Oyer and Terminer, viz. Negligentiis, &c. so that if the Act be indefinite or general, and doth not give Jurisdiction to any certain Courts in special (for then the Act is to be pursued) the general words of the Commission of Oyer and Terminer extend to it: And it was well observed, that in the Commission of the Peace the said general words, scil. De omnibus & singulis aliis malefactis & offensis have a qualification, scil. de quibus Justiciarii de pace legitimè inquirere possint aut debent, which limitation proves the large extent of the words, when they stand without any qualification.

Vide 7 Eliz. Dyer, Commissioners of Oyer and Terminer may enquire of Offences against penal Statutes, unless that the Statute appoints them to be determined in any Court of Record; and the opinion there, that any Courts of Record of the King, are restrained to the four Ordinary Courts of Record at Westminster, is not held for Law; and continual experience hath been always against it, as the Statute 5 Ed. 6. 14. of Forestallers, Ingrossers, Regrators, gives the penalty to be recovered in any Court of Record: And Justices of Assize in respect of their Commission of Oyer and Termines have always enquired of them, the Statute 33 H. 8, 9. of unlawful Games, And the Statute of Woods, 35 H 8. cap 17. and many other Statutes;. and so the Quære is well resolved in 7 Eliz. For the opinion of Eallin Saunders, and Whiddon, there it is held at this day for good Law.

2. The second consideration was had upon the Statute of 11 H.4. cap.9. and it was held, that the said Robert Scarlet was an Offender within the Statute, for it is to be understood, that the said Statute is partly affirmative of the Common Law, and partly a new Law.

In affirmance of the Common Law, in part privative, No Indictment shall be found by any person named to the Justices:. and in part positive, But by inquest of lawful people of the King, returned by the Sheriff. And that this was in affirmance of the Common Law, the Statute proves it, in the manner as was used in the time of his Noble Progenitors: And in the Preamble it is said, against the course of Common Law used and accustomed before this time: and that the said Robert Scarlet was an Offender against the said Act, for this, that he knowing that he was not returned of the Grand Inquest, procured himself by false conspiracy to be sworn, as is aforesaid: And although that a person solely was in such undue and unlawful manner sworn of the Grand Inquest, yet this was within the Act; and by consequence an offence against the Common Law, for that malice and falseness alone may be of great mischief, as appears in this case.

3. The third consideration was had of 3 H.8. 10. which alters the said Act of the 11 H.4. in part, as to denomination; For by the Act of the 3 H.8. the Justices of the Goal-delivery or Justices of Peace, of whom one to be of the Quorum, in open Court may alter the Pannel returned by the Sheriff to enquire of the King only, by addition or extraction of any Jurors so returned: And they have power to command the Sheriff to put other in the Pannel, according to their discretion: And the Sheriff ought to return the Pannel so reformed upon the penalty of the said Act, so that none can be of any Grand Inquest but by the return of the Sheriff; and for this, the Act of 3 H.8. cap. 10. hath not altered the Law, as to the offence of Robert Scarlet.

4. The said Act 11 H.4. hath made a new Law, scil. That any Indictment found against the Act shall be void, which branch doth not make void any Indictment or Presentment, that in the nature of an Indictment found any point contrary to the said Act, is made void by the said Act, so that this may draw in question all the Indictments found at the same Sessions: And for this Judgment was given that he should be fined and imprisoned.

Trin. 10. Jac.

Baker and Hall's Case.

NOte, that upon consideration of the Statute of 3 H.7.cap.14. It was resolved by Coke chief Justice of the Common Pleas, Yelverton, Williams, Snig, and others; That whereas it is provided, that what person soever who takes a Woman so against her will, &c. although that the body of the Act extend to taking only, yet in respect of this word [so] it hath relation to the Preamble (to such person as is described in the Preamble, scil. Having substance) it was agreed by all, that if the Wife hath nothing, nor his Heir apparent, it is out of the Statute, for the Statute would not have been so curious in describing the person, and all in vain. Star-chamber.

2. This word [So] relates to the quality and event of the taking, mentioned in the Preamble, scil. to be married, or defiled, for if she be not married or defiled, it is not such a taking [so] id est, so married, or so defiled; and it is not reasonable that So shall have relation to the taking, which is more remote, and not to the marriage or the defiling; which is nearer, Quod fuit concessum, &c. and Clergy is taken away by the Statute of 38 Eliz. cap.9. for Principals or Procurers before; vide Stamford, fol.37. b. accordingly: And so was the Law taken in the 3 & 4 Ph. & Mar. as Justice Dallison reported, vide Lamb.252: Justice of Peace.

Note, the Receivers of the Woman are Principals, but not the Receivers of them who took the Woman, for these are but Accessories, vide Lamb. ibid.

NOte, that I saw a Report in the time of Queen Mary upon the Statute 50 Ed.3.cap.5., & 1 R.2.c.15. concerning the arresting of them in holy Church, that the said Statutes are but an affirmance of the Common Law, and in maintenance of the liberties of holy Church, as appears by the preamble of the same Statutes, and there held, that Eundo, redeundo & morando, for to celebrate Divine Service, the Priest ought not to be arrested, nor any who aid him in it: as the case was of one who admitted the Priest to sing Mass, and that the party grieved may have an action upon the Statute 50 Ed.3. for when any thing is prohibited by an Act, although that the Act doth not give an action, yet action lieth upon it; as upon the Statute of Marlb. which prohibits to take in the high way, or Articuli super Chartas 3. which prohibits the Court of Marshalsey to hold Plea, &c. although that these Acts do not give action, yet an action lieth. 7 A.6.30, &c. and the Statute 2 H.5. which commands a Libel to be delivered, 4 Ed.4.37. vide Registrum in Bre.6.super Stat. Priviledge of Priests.

Crown. NOte, if a man be convicted, or hath judgment of death for a Felony, he shall never answer by the Common Law to any Felony done before the Attainder, so long as the Attainder remains in force, vide 8 Eliz. cap. 4. 18 Eliz. 7. And at this day, if a man be adjudged to be hanged, and hath his pardon, he shall never answer to any Felony before, for he cannot have two Judgments to be hanged. Aliter, if the first Attainder be reversed by Error: So if a man be Outlawed, and by that Attaint of Felony he cannot be arraigned of any Felony before, for he cannot be twice attaint, vide 10 H. 4. Coron. 227. case del Appeal, &c.

A Man seized of a Mannor to which he hath Stray appendent by prescription, &c. by his Baily he seizeth an Ox as a Stray within the Mannor, and makes Proclamations according to Law; and within the year and day lets the Mannor with all Royalties, Liberties, and after the year and day passed: and Dyer Serjeant did move the Court, who should have the Estray; And Brown Justice was of Opinion, that the Lessor should have it, forasmuch as he had the possession; and when the year and day are passed, the Propriety shall have relation to the time of the first seisure: But all the Justices were against him, and that the Lessee shall have it, forasmuch as the propriety of the Stray is not altered or changed before the year and day: And the Lord of the Mannor, until the year and day are past, hath but the Custody, so that the Owner may rehave it always within the year and day, if he will pay for the meat of it: Nor can the Ox be laboured or used by the Lord before the year and day, and therefore he shall be paid for the meat, unless it be such a Beast as of necessity ought to be used, as a Milch Cow, &c. And it was held, that if one take a Stray within a year and a day, if it stray out of the Mannor, the Lord may re-take it before seisure,

Simony, Stat. 31 Eliz. IN the case of Doctor Hutchinson, Parson of Kenn, in the County of Devon, It was resolved per totam Curiam, that if any shall receive or take Money, Fee, Reward or other profit, for any presentation to a Benefice with Cure, although in truth he which is presented be not knowing of it, yet the presentation, admission, and induction are void per expressa verba Statuti of 31 H. 8. cap. 6. And the King shall have the presentation hac vice, for the Statute intends to inflict punishment upon the Patron, as upon the Author of this Corruption, by the loss of his presentation, and upon the Incumbent, who came in by such a corrupt Patron, by the loss of his Incumbency, although that he never knew of it; but if the Presentee be not cognizant of the Corruption, then he shall not be within the clause of disability in the same Statute: And so it was resolved by all the Justices in Fleetstreet, Mich. 8 Jac. fol. 7. vide Statuti, which are very well penned against the avarice of corrupt Patrons.

Hugh

Hugh Manney's Case.

IN an Information in the Exchequer against Hugh Manney Esq; the Father, and Hugh Manney the Son, for intrusion and cutting off a great number of Trees in the County of Merioneth, the Defendants plead, Not guilty: And Rowland ap Eliza Esquire, was produced as a Witness for the King, and deposed upon his Oath to the Jurors, that Hugh the Father and the Son joyned in sale of the said Trees, and commanded the Vendees to cut them down, upon which the Jurors found for the King with great dammages; And judgment upon this was given, and execution had of a great part. Perjury.

And Hugh Manney the Father exhibited a Bill in the Star-chamber at the Common Law, against Rowland ap Eliza, and did assign the Perjury in this, that the said Hugh the Father did never joyn in sale, nor command the Vendees to cut the Trees; and the said Rowland ap Eliza was by all the Lords in the Star-chamber convict of corrupt and wilful Perjury: And it was resolved by all, that it was by the Common Law punishable before any Statute: And although that the Witness depose for the King, yet he shall the rather be punished than for another, for the King is the Head and Fountain of Justice and Right; and he who perjures himself for the King, doth more offend than if it were in the case of a Subject.

Haye's Case, in Curia Wardorum.

BY Inquisition in the County of Middlesex, An. 6 Jac. by vertue of a diem clausit extremum, after the death of Humphrey Wilward, it was found that the said Humphrey died seized of a Messuage and twenty six acres of Land in Stepney; and that John Wilward was his Heir, and of the age of fourteen years and nine days; and that the Land was held of the King in Capite, by Knights-service, John Wilward died within age, and by Inquisition in Mid. 8. Junii An. Jac. by vertue of a Writ of Devenerunt, after the death of the said John Wilward, it was found that the said John died seized in Ward to the King, and that the said Messuages and Lands at the time of the death of the said John, were holden of the Dean of Pauls, as of his Mannor of Shadwell.

All the mean Rates incurred in the life of John Wilward, are paid to the King.

The Questions are,

1. Whether by the Death of the said *John*, and finding of the mean Tenure in the *Devenerunt*, the first Office granted to Points be determined?
2. Whether the Tenure found by the first Office may be traversed?

And

And as to these Questions, it was resolved by the two chief Justices and chief Baron, that where the said John died, the Office found by force of the said Writ of Diem clausit extremum, after the death of Humphrey Wilward, whereby the King was entituled to the Guardianship of the said John, hath taken its effect and is executed, and does remain as evidence for the King after the death of the said John, but nevertheless is not traversable, for it is traversable during the time it remains in force only, and the Jurors upon the Devenerunt after the death of the said John, are at liberty to find the certainty of the Tenure, and they are not concluded by the first Inquisition, for they are sworn Ad veritatem dicendum, and with this agrees, 1 H. 4. 68. And all this appears by the diversity between the Writ of Diem clausit extremum, and the Writ of Devenerunt: And it is to be observed, that there is no difference between the Writ of Diem clausit extremum, and the Writ of Devenerunt, but in one point; to wit, the Diem clausit extremum is general. Viz. Quantum terrarum & tenementorum idem H. tenuit de nobis in capite, &c. die quo obiit, & quantum de aliis generally; and the Devenerunt recites, quod J. filius & Hæres H. qui de nobis tenuit in Capite, nuper dum fuit infra ætatem, & in custodia nostra fuit, Diem clausit extremum, ut accipimus: tibi præcipimus, quod per Sacramentum 12. inquiras, quæ terræ & tenementa per mortem prædicti H. & ratione minoris ætatis prædicti J. ad manus nostras devenerunt, &c. So that this Writ is not general, but does restrain only the Lands and Tenements, Quod devenerunt, &c. and all the other points of the said Writ do relate to the Lands and Tenements, Quæ devenerunt, &c. by which it appears, that the first Inquisition is not so concludive, but that by the express Rules of the Writ, the Jurors are at large to find the truth of the Tenure, notwithstanding the first Office. And so it was resolved and decreed accordingly, nono Jacobi, in the Court of Wards in the case of Dune Lewes.

Award of *Capias utlegatum* by Justices of the Peace.

IN the same Term the opinion of all the Court of Common Pleas was, that if one be Outlawed before the Justices of Assize, or Justices of Peace, upon an Indictment of Felony, that they may award a Capias utlegatum, and so was the Opinion of Periam chief Baron, and all the Court of the Exchequer as to the Justices of Peace, for they that have power to award process of Out-lawry, have also power to award a Capias utlegatum, as incident to their Authority and Jurisdiction: See the Statute of the 34 H. 8. cap. 14. for certificate of a short Transcript of every Attainder, Conviction, or Out-lawry of Felony, by the Clerks of the Assizes, Clerks of the Peace, &c. into the Kings Bench, on penalty of forty shillings, &c. And note well, that such Transcript is by the said Act made to be of as great force as the Record it self: See Lambert in his Justice of Peace, fol. 563. contra, but see 1 Ed. 6. cap. 1. Justices of Peace in case of profanation of the Sacrament shall award a Capias utlegatum throughout all England.

Her-

Herſey's Caſe, Star-Chamber.

JOhn Herſey Gent, exhibited his Bill in the Star-chamber againſt Anthony Barker Knight, Thomas Barker Councellor of Law, Robert Wright Doctor of Divinity, Ravenſcroft Clerk, and John Haynes; and did thereby charge the Defendants with the forging of the Will of one Margery Pain, and the cauſe came to hearing, Ad requiſitionem Defendentium, and upon hearing of the Plaintiffs Counſel, there appeared no purpoſe or preſumption againſt the Defendants, or any of them, but that the Teſtament was duly proved in the Eccleſiaſtical Court, and upon an Appeal was alſo affirmed before Commiſſioners Delegates, and had alſo been decreed in the Chancery; ſo that it appeared to the Court, that the ſaid Bill was preferred of meer malice and ſpite, to ſlander the Defendants, without any colour, and becauſe the Defendants had no remedy at the Common Law for the ſaid ſlander, and if ſuch ſlander ſhould paſs unpuniſht, it may encourage malicious men to make this Court as a Paſquil, to fix therein a Libel of Record to charge thoſe that are innocent with hainous Crimes, to remain to all perpetuity.

In this cauſe it was reſolved by the Court, that by the courſe of the Court, and according to former Preſidents, the Court may give dammages to the Defendants, and ſo was it done, viz. two hundred pound to the Doctor of Divinity, two hundred marks to the Knight, forty pound to the Clerk, a hundred and twenty pound to the Woman, and it was ſaid, that Creare ex nihilo, quando eſt bonum, eſt divinum; ſed creare aliquid ex nihilo, quando eſt malum, eſt diabolicum; & plus Maledicere nocet, quam Benedicere docet.

Hill. 2. Jac.

THeodore Thomlinſon had brought an Action of Account for Goods againſt one Philips in the Common Pleas, and thereupon Philips ſued Thomlinſon in the Court of the Admiralty, ſuppoſing the Goods to have been received in forreign parts beyond the Seas: and the ſaid Thomlinſon being committed for refuſing to anſwer upon his Oath to ſome Interrogatories there propoſed to him, brought his Habeas Corpus, which was returned thus, Ego William Pope Mareſcallus ſupremæ Curiæ Admiralitatis Angliæ Dom. Juſtic. Sereniſſ. Reginæ noſtræ in brevi huic Schedulæ annex. ſpecificat. Certific. quod infra vocat. Theodore Thomlinſon ante advent. iſtius brevis capt. fuit & cuſtodiæ meæ commiſſ. ex eo quod dictus Theodorus Thomlinſon vinculo ſacramenti coram Judice Admiralitatis Angliæ aſtrictus ad reſpondend. quibuſdam Articulis contra eum in dicta Cur. dat. &c. ſub pœna quinque librarum, &c. contumaciter examen ſuum ſubire recuſavit, Idcirco, &c. And it was reſolved by the Court of Common Pleas;

1. That the Court of Admiralty hath no Cognizance of things done beyond Sea, and this appears plainly by the Statute of 13 Rich. 2. cap. 5. the words of which Statute are, that the Admirals and their Deputies ſhall not meddle from henceforth of any thing done within the Realm, but only of a thing done upon the Sea, vide 19 H. 6. fol. 7. For things tranſitory done beyond the Seas, are either triable in the Kings Courts, or the party

party grieved may have his remedy before the Justices where the Fact was done beyond Seas.

2. That the proceedings in the Court of the Admiralty are according to the course of the Civil Law, and therefore the Court is not of Record, and by consequence cannot assess any fine in such case, as Judges of a Court of Record may do.

3. That the return above-mentioned was insufficient, as being too general, because it is not specified for what cause or matter Thomlinson was examined, so as it might appear that the Interrogatories were of such things, as were within their Jurisdiction, and that the party ought by Law to answer upon his Oath, for otherwise he might very well refuse.

This Case was intended to have been inserted by my Lord Coke *into his seventh Report, but not then published, because the King commanded that it should not be printed, but the Judges resolved* ut supra.

Right to Seats in the Church.
Corven's Case.

Hob. 69. 2 Bro. 566, & 605. Godbolt. 199.

COrven did Libel against Pym, an Attorney of this Court, for a Seat in a Church in the County of Devon: And Pym by Serjeant Hutton, moved the Court to have a Prohibition upon this reason, that himself is seized of a house in the said Parish, and that he, and all those whose Estate he hath in the house, have had a Seat in an Isle of the Church: And it was resolved by the Court, that if a Lord of a Manor, or other person, who hath a house and Land in the Parish, time out of mind, and had a Seat in an Isle of the same Church, so that the Isle is sole and proper to his Family, and they have maintained it at their own charges, that if the Bishop would dispossess him, he shall have a Prohibition, for it shall be intended that the party's Ancestors, or those whose Estate he hath, have erected and built the Isle with the assent of the Parson, Patron, and Ordinary, to the intent to have it only to himself. But for a Seat in the body of the Church, if a question ariseth concerning it, it is to be decided by the Ordinary, because the Freehold is to the Parson, and the place is dedicated and consecrated to the Service of God, and is common to all the Inhabitants; And therefore it belongs to the Bishop to order it in such manner as the Service of God may be best celebrated, and that there be no contention in the Church. And it is to be presumed, that the Ordinary, who hath the cure of Souls, will take order in such cases, according to right and convenience; that is to say, to take care that Gentlemen may have places fit for them, and the poor people fit places for them also; And the ordering thereof is a matter meerly Spiritual; and with this agrees 8 H. 7. 12. and the chief Justice cited the case of Dame Wiche in 9 H. 4. 14. and said, the case there was, that the Lady brought a Bill in the Kings Bench against a Parson, Quare unam Tunicam vocatam a Coat-armor & Pennons with the Arms of the said Sir Hugh Wiche her Husband, and a Sword in a Chappel where he was buried.

And the Parson claimed them as Oblations, and therefore that they did belong to him; And there it is holden, that if one use to sit in the Chancel, and hath there a place, his Carpet, Livery, and Cushion, the Parson cannot claim them as Oblations, neither ought he to have the said things, for that they were hanged there in honour of the deceased; and therefore,

therefore, by the same reason, although a grave-stone, coat of armor, tomb, &c. are annexed to the Free-hold of the Parson, yet in regard the Church is free to all the inhabitants for burying, the Parson cannot take them.

And the chief Justice said, that the Lady might have a good action during her life, in the case aforesaid, because she her self caused the said things to be set up there, and after her death, the Heir to be deceased shall also have his Action, because that (as the Book saies) they were hanged there for the honour of his Ancestor, and therefore they are in nature of Heirlomes, which by the common Law belong to the Heir, as being the Principal of the Family: The like Law of a Grave-stone, Tomb, and the like,

And this agrees with the Laws of other Nations, Bartho. Cassaneus, fol. 13. Concl. 29. Action dat. si aliquis arma, in aliquo loco posita, deleat sive abrasit, &c. & in 21 Ed. 3. 48. in the Bishop of Carlile's case, it appeared, that the Ornaments of the Chappel of a preceding Bishop, do belong to the succeeding Bishop, and are merly in succession, although that other Chattels, in case of a sole Corporation, do belong to the Executors of the deceased party, and shall not go in succession, : so in the other case, things erected in the Church for the honour of the dead person, shall go to his Heirs, as Heirlomes, as in manner of an Inheritance.

Note, that in Easter Term, 10 Jacobi, It was resolved in the Court of Star-chamber, in the case between Hussey and Katherine Leyton, and others, that if a man have a House in any Parish, and time out of mind he and all those whose Estate he hath, have used to have a certain Pew in the Church, that if the Ordinary will displace him, he shall have a Prohibition; for if he hath it by prescription, he has as good right in the Seat, as he hath in his house; but observe that he must claim it as belonging to his house, and not in other manner, for properly it belongs to the Inhabitants in the Manor House, if any Manor be, and not to the Manor which includes other Tenants. Farmers, and Inhabitants: But true it is, that the Ordinary shall dispose of common and vulgar Seats in the Church, where there is no such prescription, as is aforesaid.

Earl of Shrewsburie's *Case.*

By force of certain Letters (bearing date 28 Martij. 1612.) of the Lords of the privy Council, directed to Sir Humphrey Winch, Sir James Ley, Sir Anthony Saintleger, and Sir James Hulleston; they did certifie to their Lordships the Claim of Gilbert, Earl of Shrewsbury, to the dignities of the Earldom of Waterford; and Barony of Dungarvan in Ireland, in such manner as follows. Ireland.

King Henry the sixth, by his Letters Patents, in the twentieth year of his Reign, did grant to his thrice beloved Cosin, John Earl of Shrewsbury, in consideration of his approved and loyal Services, in the City and County of Waterford, pro eo quoque quod eundem consanguineum nostrum prædicta terra nostra Hiberniæ in partibus illis contra inimicorum & Rebellium nostrorum insultus potentius defendat, ipsum in Comitem Waterford, una cum stilo & titulo ac nomine & honore eidem debitis ordinamus & creamus habendum to the said Earl and his Heirs Males of his body: and further by the said Letters Patents, did grant the Castles, Lord-ships, Honours, Lands, and Manors of Dungarvan. to the said Earl and the Heirs Males of his body,

to hold the Premisses of the King and his Heirs, by Homage and Fealty, and by the Service of being his Majesties Seneschal in the Realm of Ireland; Afterwards in the Parliament called Des absentees, holden at Dublin in Ireland the tenth of May, the twenty eight of Henry the eighth by reason of the long absence of George Earl of Shrewsbury out of the said Realm; It was enacted, that the King his Heirs and Assignes, shall have and enjoy in right of his Crown of England all Honours, Manors, Castles Lordships, Franchises, Hundreds, Liberties, Count-palatines, Jurisdictions, Annuities, Fees of Knights, Lands, Tenements, &c. and all and singular Possessions, Hereditaments, and all other Profits as well Spiritual as Temporal whatsoever, which the said George Earl of Shrewsbury and Waterford, or any other person or persons had to his use, &c. King Henry the eighth, by his Letters Patents, the twenty ninth of his Reign, reciting the said Statute De absentees, Nos præmissa considerantes, & nolentes statum, honorem, & dignitatem prædicti comitis diminuere, sed amplius augere, de certa scientia & mero motu, &c. did grant to the said Earl and his Heirs, the Abby of Rufford, with the Lands thereto belonging in the County of Nottingham, and the Lordship of Rotheram in the County of York, the Abbies of Chesterfield, Shirbrook, and Glossadel in the County of Derby, with divers other Lands and Tenements of great value, to be holden in Capite: And the questions were.

1. Whether by the long absence of the Earl of Shrewsbury out of Ireland, by reason whereof the King and his Subjects wanted their defence and assistance there; the Title of the Honour be lost or forfeited, the said Earl being Peer of both Realms, and residing here in England.

2. Whether by the said Act De absentees, An. 28. H. 8. the title of the Dignity of the Earl of Waterford, be taken from the said Earl, as well as the Manors, Lands, Tenements, & other Hereditaments in the said Act specified.

And afterwards by others Letters Patents of the Lords of the Council, dated the twenty seventh of September 1612. the two chief Justices and the chief Baron were required to consider of the case, which was inclosed within their Letters, and were to certifie their opinions of the same.

Which case was argued by Council learned in the Law, in behalf of the said Earl, before the said chief Justices and chief Baron, upon which they having taken great consideration and advisement, after they had read the Preamble, and all the said Act of the 28 of H. 8. It was unanimously resolved by them all, as followeth.

As to the first it was resolved, that forasmuch as it does not appear what defence was requisite, & that the consideration Executory was not found by Office to be broken as to that point, the said Earl of Shrewsbury notwithstanding does remain Earl of Waterford.

As to the second, it was resolved, that the said Act of the twenty eighth of H. 8. De Absentees, doth not only take away the possessions which were given to him at the time of his creation, but also the dignity it self, for although one may have a dignity without any Possessions Ad sustinendum nomen & onus, yet it is very inconvenient that dignity should be clothed with Poverty: And in cases of Writs, and such other legal proceedings, he is accounted in Law a Noble man, and so ought to be called, in respect of his Dignity; but yet if he want Possessions to maintain his Estate, he cannot press the King in Justice to grant him a Writ to call him to the Parliament; and so was it resolved in the case of the Lord Ogle, in the Raign of Ed. the sixth, as the Baron of Burleigh, Lord Treasurer of England, at the Parliament An. 35 Eliz. did report: And therefore the Act of the 28 H. 8. (as all other Acts ought to be) shall be expounded to take away all inconveniente, and therefore by the general words of the Act, Viz.

of

of Honours and Hereditaments, the Dignity it self, with the Lands given for maintenance of it, are given to the King, & the Dignity is extinct in the Crown: And the cause of degradation of George Nevil Duke of Bedford is worthy the observation, which was done by force of an Act of Parliament. 16 June 17 Ed. 4. which Act reciting the making of the said George Duke, doth express the cause of his degradation in these words: And forasmuch as it is openly known, that the said George hath not, or by Inheritance may have any livelyhood to support the said Name, Estate, and Dignity, or any name of Estate: And often times it is so seen, that when any Lord is called to high Estate, and hath not convenient livelyhood to support the same Dignity, it inducеth great poverty and indigence, and causeth oftentimes great Extortion, Imbracery, and Maintenance to be had, to the great trouble of all such Countries where such Estate shall happen to be: Wherefore the King by advice of his Lords Spiritual and Temporal, & by the Commons in this present Parliament assembled, and by the authority of the same, ordaineth, establisheth, and enacteth, that from henceforth the same Creation and making of the said Duke, and all the names of Dignity given to the said George, or to John Nevil, his Father, be from henceforth void and of none effect. &c. In which Act, these things are to be observed. Honour taken away for poverty.

1. That although the Duke had not any Possessions to support his Dignity, yet his Dignity cannot be taken from him without an Act of Parliament.

2. The Inconveniences do appear, where a great State and Dignity is, and no livelyhood to maintain it.

3. It is good reason to take away such Dignity by Act of Parliament, and therefore the said Act of the 28 H.8. shall be expounded according to the general words of the Writ, to take away such inconvenience: And although the said Earl of Shrewsbury be not only of great Honour and Vertue, but also of great possessions in England, yet it was not the intention of the Act to continue him Earl in Ireland, when as his Possessions in Ireland were taken away from him, but that the King at his pleasure might confer as well the Dignity as the Possessions to any other, for the defence of the said Realm. And the said Letters Patents de Anno 29 H.8. hath no words to restore the Dignity, which the Act of Parliament hath taken away; but it was not the intent of the King *Diminuere statum, honorem, & dignitatem ipsius Comitis*, but *Augere* his Possessions for maintenance of his Dignity, for so much appears by this word *Augere*; for he doth by the said Letters Patents, with exceeding great bounty, increase the Revenues of the said Earl in England, which the King did think was an encrease of large Possessions in England, instead of all that which was taken away from him by the Act of the 28 H.8.

And whereas it was objected, that the general words Honours and Hereditaments are explained and qualified by the said words Relative subsequent, Which the said George, or any to his use hath; and therefore it shall not be intended of any honour or Hereditament, but of such whereof others are seised to his use, and no man can be seised of the Dignity, and therefore that the said Act doth not extend to it; but that it is to be understood Reddendo singula singulis, and these words Which the said George Earl hath, are sufficient to pass the Dignity and with this agrees the opinion of all the Judges of England in Nevil's case upon the like words in the Statute of the 28 H.8. in the seventh part of my Reports, fol. 33, & 34.

Hill. 2 Jac.

Jurisdiction of the Court of Common Pleas.

IN the last Term, by commandment of the King, the Justices of the Kings Bench, and the Barons of the Exchequer, were assembled before the Lord Chancellor Elsmer at York House, to deliver their Opinions, whether there was any authority in our books, that the Justices of the common Bench may upon information made to the Court (which commonly is called suggestion) grant Prohibitions, or whether of necessity every Plea ought to be pending in the Court for such cause, and the King would know their Opinions in this case: And the Judges took time to deliver their Opinions until this Term. And then Fleming chief Justice, Tanfield chief Baron. Snig, Altham, Crook, Bromely, and Doderidge. (Yelverton and Williams, Justices being dead since the last Term) did deliver their Opinions to the said Lord Chancellor. That the Presidents of each Court are sufficient Warrants for their proceedings in the same Court; and therefore as well in the Kings Bench and in the Exchequer; as in the common Bench, the Judicial Presidents in them are good Warrants of their proceedings, and therefore for a long time, and in many successions of reverend Judges, Prohibitions upon information, without any other Plea pending have been granted, Issues tried, Verdicts and Judgments given upon Demurrer; all which being in force, they were unanimously agreed to give no Opinion against the Jurisdiction of the Court of the common Bench in this case, and none of the Judges of the common Bench were called, or present at any conference concerning this matter, & yet Laqueus confractus est, & nos liberati sumus. Et, magna est veritas & prævalet: See my particular Treatise of the Jurisdiction of the common Bench in this point, by which the Jurisdiction of that Court evidently appears.

Hill. 10 Jac.

Parliament in Ireland.

THe Lords of the Council did write to the two chief Justices and chief Baron in these words, After our hearty commendations to your Lordships: Whereas his Majesty for divers weighty considerations hath resolved to hold a Parliament within the Realm of Ireland: And that by an Act made in the tenth year of H. 7. called Poynings Act, It is provided, That all such Bills as shall be offered to the Parliament there, shall be first transcribed hither under the great Seal of that Kingdom, and having received allowance

allowance and approbation here, shall be put under the great Seal of this Kingdom, and so returned thither to be preferred to the Parliament; forasmuch as there are accordingly transferred hither from thence divers Bills, as well publick as private, some of which Bills were first agreed on here, some others were framed and conceived there, and coming now hither may happily receive amendment and alteration: We have thought meet for avoidance of any Question, or inconvenience that may arise of the manner and form of proceedings in amending or altering of those Bills, hereby to pray and require you, calling to you his Majestie's Attorney and Solicitor, to look into Poynings Act, and to consider of such course as shall be fit to be held concerning the same, &c. *Dat. ultimo Junij.* 1612. Upon which in this Term the said chief Justices, chief Baron, Attorney, and Solicitor general were assembled two several daies at Serjeants Inn; and they had not only considered of the 10 H. 7. cap. 4. called Poynings Act; but also of an Act made in the Realm of Ireland, 3 and 4 Phil. and Mar. cap. 4. intituled, An Act declaring how Poynings Act shall be expounded and taken: For by the said Act of the 10 H. 7. it is provided, that no Parliament be hereafter holden in the said Land of Ireland, but at such seasons as the Kings Lieutenant and Council there first do certifie the King under the great Seal of that Land, the causes and considerations, and all such Acts as to them seemeth should pass in the said Parliament: And such Causes, Considerations, and Acts affirmed by the King and his Council, to be good and expedient for the Land, and his License thereupon, as well in affirmation of the said causes and Acts, as to summon the said Parliament under the great Seal of England had and obtained: That done, a Parliament to be had and holden after the form and effect before rehearsed: And if any Parliament be holden in that Land hereafter, contrary to the forme and provision aforesaid, it be deemed void and of none effect in Law. Upon which Act, divers doubts and ambiguities were conceived, some whereof were of greater difficulty than others: And first, A Doubt was conceived, whether the said Act of the 10 of H. 7. does extend to the Successors of H. 7. for that the Act speaks only of the King generally, and not of his Successors. 2. If the Queen Mary were within the Word King: and although these were not matters of great ambiguity, for that this word King, which imports his politick capacity, which never dies, and being spoke indefinitely, does extend in Law to all his Successors, yet is this so expounded in the said Act of 3 and 4 Phil. and Mar. Viz. That the said Act of the 10 of H. 7. shall extend to the Kings and Queens Majesty, her Heirs and Successors. Secondly, Where the Act of Poynings saies, The Kings Lieutenant and Council there, a scruple did arise, that if the King appoint one by the name of his Deputy, or Lord Justice, or if he constitute two Lords Justices, chief Governor or Governors, and the Council, &c. and therefore it is explained in the Act of the 2. and 3. Phil. and Mar. that the said Act of Poynings extends to all of them. Thirdly, the greatest and most difficult doubt was upon these words of the Act of Poynings: And such Causes, Considerations, and acts affirmed by the King and his Council to be good and expedient for that Land, &c. Whether the King may make any change or alteration of the Causes, considerations, or Acts which shall be transmitted hither from the Lieutenant and council of Ireland, for that it is not affirmative, but correction and alteration of them; and therefore it was necessary to explain, that the Act of the 3 and 4 Phil. and Mar. was in these words, Either for the passing of the said acts, and in such form and tenor as they should be sent into England, or else for the change or alteration of them, or any part of the same. Fourthly, Another Question was upon the words of the first Act, Viz. That done, a Parliament to be had and

The word *King* extends to his Successors.

The word *King* extends to the word *Queen*.

and holden, &c. If at the ſame Parliament other Acts, which have been affirmed or altered here, may be enacted by the Authority of the Parliament there, the which is explained by the ſaid laſt Act in theſe words, Viz. For paſſing and agreeing upon ſuch Acts, and no others, as ſhall be ſo returned under the great Seal of England. Fiftly, Great doubt did ariſe on theſe Words, That done a Parliament to be holden, whether the Lievtenant and Council of Ireland, after the Parliament begun, and Pendente Parliamento, may upon debate and conference had there, tranſmit any other conſiderations, Cauſes, Tenors, Proviſions, and Ordinances, as ſhall ſeem to them to be good to be enacted of the ſaid Parliament within the Realm of Ireland, the which is explained by the ſaid 3 and 4 Phil. and Mar. by expreſs words, that they may.

Note Reader, the Order of Proceedings and Summons of Parliament in Ireland; Firſt, the Lievtenant and Council do certifie under the great Seal of Ireland the cauſes and conſiderations of all ſuch Acts, as ſeem good to them to be paſſed in Parliament, ſo that Originally it is to begin there. 2. They are to be affirmed, altered, or changed, and returned under the great Seal. 3. Licenſe under the great Seal to ſummon and hold a Parliament. 4. To be done *Pendente Parliamento*, as it apears ought to be.

And it was unanimouſly reſolved, that the Cauſes, conſiderations and Acts tranſmitted hither under the great Seal of Ireland, ought to be kept and preſerved here in the Chancery of England, and ſhall not be remanded. 2. If they be affirmed, they ought to be tranſcribed under the great Seal & returned into Ireland, & all that which paſſes the great Seal, ought to be enrolled here in the Chancery. 3. If the Acts tranſmitted hither be in any part altered or changed here, the Act ſo altered and changed, ought forthwith to be returned under the great Seal of England; but the tranſcript under the great Seal of Ireland, which remains in the Chancery here, ſhall not be remanded: but the amendment ſhall be under the great Seal of England, as aforeſaid, returned into Ireland, without any ſignification or certification of their allowance by thoſe in Ireland, for as the Acts move originally from Ireland, ſo the amendments or alterations move here in Eng. all the Bills which are tranſmitted here from Ireland, are with the petition of the Deputy and Council of the King altogether under the great Seal of Ire. & ſo alſo the Acts which are affirmed or altered, are returned together under the great Seal of Eng. See 10 H. 6. 8. which begins, Mich. 18 H. 6. Rot. 46. coram Rege, how the Parliament in Ireland was holden there before Poynings Act. And ſee another Act made at the Parliament in Ireland in the ſame year of 10 H. 7. c. 22. it is enacted, that all Statutes late made within this Realm of England concerning or belonging to the common and publick-Weale of the ſame, from henceforth to be deemed good and effective in the Law, and over that, be accepted, uſed and executed within this Land of Ireland, in all points, at all times requiſite, according to the tenor and effect of the ſame: And over that, by the Authority aforeſaid, that they and every of them be authoriſed, proved, and confirmed within the ſaid Realm of Ireland and if any ſtatute or ſtatutes have been made within this ſaid Land heretofore to the contrary, that they and every of them by the authority aforeſaid, be annulled and revoked, void and of none effect in the Law. And obſerve, that this word (late) in this act, hath the ſame ſence as (before) ſo that this Act extends to all Acts of Parliament made in England before the Act of 10 H. 7. And that is the reaſon, that all Acts of Parliament made in England before this Act concerning Ireland, but onely general Acts made ſince the ſaid Act of 10 H. 7. do not bind them, becauſe that (as it hath been ſaid) they have a Parliament for the Realm of Ireland, and thoſe of Ireland do not come to our Parliament, vid. R. 3. 12.

Hibernia

Hibernia habet Parliamenta & faciunt leges, & nostra statuta non ligant eos, quia non mittunt Milites ad Parliamentum, sed personæ eorum sunt Subjecti Regis, sicut Inhabitantes Calinæ, Goscogniæ & Guienæ.

But question is made of this in some of our Books, Vid. 20 H.6.8.32 H. 6.25.1 H.7.3.8 H.7.10.8 Rich.2. processe 204.10 Ed.5.41.13 Ed.2 titulo bastard, 11 H.4.7.7 E.4.27. Plowdens Comment. 368.13 Eliz.Dyer 35.2 Eliz. Dyer 366.Calvins Case in the seventh part of my Reports 226.14 Ed.3.184. A Prebend in England is made Bishop of Dublin in Ireland, his Prebendary is void. Note. Note.

See the Statute of Ireland, upon what Books and Acts of Parliament: this question is now by common experience and opinion without any scruple resolved, That the Acts of Parliament made in England since the Act of the 10 H.7. do not bind them in Ireland; but all Acts made in England before the 10 H.7. by the said Act made in Ireland An.10 H.7.cap.22. do bind them in Ireland. Where a Statute in *England* is of force in *Ireland*.

NOte, that Camden King at Armes told me, that some held, that if a Baron dies, having issue divers Daughters, the King may confer the Dignity to him who marries any of them, as hath been done in divers cases, Viz. In the case of the Lord Cromwell, who had issue divers Daughters, and the King did confer the Dignity upon Burchier who married the youngest Daughter, & he was called Lord Cromwel: And so in other cases: And he said, that the Earl of Glocester, who had married the Daughter of King Henry the third, and the Countess after Married Mount Hermer, who was her Husbands Secretary, for which the King Imprisoned him; and after being restored to the Kings Favour, during the minority of the Son of the said Earl of Glocester, and until the Infant came of full age, and when the Infant was of full Age, he was called to the Parliament by the name of the Earl of Glocester, and the other by the name of Mount Hermer Knight; and he said, that it appears in the Edict, or Statute made in France, that if any be made Duke, Marquels, Earle, or Baron of any privileged place, as of Guise, &c. if he die without Heir Male of his body; the Dignity is not only extinct, but the King shall have the Manor or Territory whereof he took his name and Dignity: Sed nos non habemus talem consuetudinem. Dignity. Prerogative.

NOte (by Linwood) that it appears that by the Canons Ecclesiastick, none may exercise Ecclesiastical Jurisdiction, unless he be within the Orders of the Church, because none may pronounce excommunication, but a spiritual person: And there it appears, that as well the Register as the Judge ought to be spiritual; but now by the Statute of the 37 H.8.cap.17. A Doctor of Law or Register, although he be a Lay-man may execute Ecclesiastical Jurisdiction. Ecclesiasticall jurisdiction.

Note also, that by the Canons no Ecclesiastical Judge ought to cite any Church-warden to the Court, but so as he may return home again to his house the same day.

Also the Canons do limit how many Courts Ex Officio they may have within a year.

Mich.

Mich. 11. Jac.

Custom, of *London.*

NOte, that if a man give to one of his Children a certain sum in his life, & after dies, although this is not given as a Childs full Portion, yet it shall be sufficient for him: but if the Father by writing, or by Will does declare that it is but part of a Childs Portion, then he shall have a full Childs part, otherwise not: But some made a difference, where this sum so given, and declared to be put for part, shall be accounted upon account parcel of the intire Estate, or not; that is to say, if the Issue so in part advanced, shall have so much as amounts to a Childs part, & that the Wife and the Executor shall gain thereby, where that this Portion is so given, shall be of no benefit to the Wife or the Executors.

As if a man hath two Children, & gives to one of them a hundred pound in part of his advancement, and then dies worth 900 l. in this case the Wife, the Issue not advanced, and the Executors shall have but three equal parts of the 900 l. Viz. three hundred pounds apeice; and then this hundred pound so given shall be in Hotchpot between the Children: which (as I think) cannot be; for then there shall not be equality among the Issues, as the Custom doth require, who ought in my opinion to have the precedency of favor, if any be.

Devise.

Note, it was holden by the Judges in the Kings Bench, that if a man be possessed of a house & term for years, doth devise for years, does demise this to his Wife for life, the remainder over, and dies, all his debts being paid; if the Widdow enters generally, and converts the profits to her own use, and not to pious works; this is a determination of her Election: And this is the general case, and therefore it is good that it be specially found.

Hayne's *Case.*

NOte, in the Lenten Assise holden at Leicester 11, & 12. Jac. the case was, That one William Haynes had digged up the several Graves of three Men and one Woman in the night, and had taken their winding Sheets from their bodies, and buried them again, And it was resolved by the Justices at Serjeants Inne in Fleetstreet, that the property of the Sheets remain the owners, that is, in him who had property therein, when the dead body was wrapped therewith, for the dead body is not capable of it, as in 11 H. 4. If Apparel be put upon a Boy, this is a Gift in the Law, for the boy hath capacity to take it, but a dead body being but a lump of earth, hath no capacity; also it is no gift to the person, but bestowed on the body, for the reverence towards it, to express the hope of Resurrection. Also a man cannot relinquish the property he hath to his Goods, unless they be vested in another; and accordingly at the said Assises, he was severally indicted for taking of each of these Sheets: And the first Indictment was of petty Larceny, for which he was whipped; And at the same Assises he was also indicted for the Felonious taking the three other Sheets, for which he had his Clergy, and so escaped the sentence of death, which he well deserved, for this inhumane and barbarous Felony.

Felony to steal a Winding sheet,

Who hath propriety in them.

Hill.

Hill. 11. Jacobi.

Earl of Derbie's Case.

IN the Chancery, between Sir John Egerton Plaintiff, and William Earl of Derby, Chamberlain of Chester, and others, Defendants, for the trust and interest of a Farm called Budshaw in the County of Chester: It was resolved by the Lord Chancellor, the chief Justice of England, the Master of the Rolls, Doderidge and Winch, Justices. County Palatine.

1. That the Chamberlain of Chester, being sole Judge of Equity, cannot decree any thing wherein himself is party, for he cannot be a Judge in propria causa: but in such case where he is party, the Suit shall be heard here in the Chancery, Coram Domino Rege.

2. If the Defendants dwell out of the County Palatine, he who hath cause to complain in equity, may also complain here in the Chancery, for in respect that proceedings in Chancery do bind the person only, if the person be out of the Jurisdiction, the Chamberlain of Chester cannot relieve the party; and therefore, Ne curia Domini Regis deficeret in justitia exhibenda, the Suit shall be here in the Chancery; for else the Subject shall have good right, and yet have no remedy, which will be inconvenient.

And this does pursue the reason of the Common Law, as appears 13 Ed. 4. tit. Jurisdiction. 8 Ed. 2. Ass. 382. 5 Ed. 3. 30. 30 H. 6. 6. 7 H. 6. 37. The Case of the Lord of the Marches of Wales, although an Action will lie in Wales, yet because he which hath cause of Action cannot have Justice there, he shall sue here in the Kings Bench; for where the particular Courts cannot do Justice to the parties, they shall sue in the Kings general Court at Westminster, 11 H. 4. 27. 8 Ed. 4. 8. in all cases where it appears to the Court, that those who have liberties to take Conizans, do fail of right, as in matter of foreign plea, &c. the matter shall be determined in the general Courts at Westminster.

3. It was resolved, that the King cannot grant a Commission to determine any matter of equity, but it ought to be determined in the Court of Chancery, which hath had Jurisdiction in such case time out of mind, and had always such allowance by the Law: But such Commissions or new Courts of equity shall never have such allowance, but have been resolved to be against Law, as it was agreed in Potts case. Note, Causes in equity may not be determined by Commission.

4. Upon consideration had of the Certificate of the Lord Dyer and other Justices in the time of Queen Elizabeth, concerning the Jurisdiction of the County Palatine of Chester; It was resolved, that for things transitory, although that in truth they be within the County Palatine, the Plaintiff may by Law alledge them to be done in any place within England, and the Defendant may not plead to the Jurisdiction of the Court, that they were done within the County Palatine: See Dyer 13 Eliz. fol. 302. 716. Office found by Mandate out of Chancery of Land in Cheshire is void.

Forms and Orders of Parliament.

Proceedings in Parliament.

IN the House of Commons, when the Speaker is chosen, he in his place where he first shall sit down, shall disable himself, and shall pray that they would proceed to a new Election: but after he is put into the Chair, then he shall pray them, that with their favours he may disable himself to the King, so that their expectations may not be deceived.

But note, that the King the first day of Parliament shall sit in the upper house of Parliament, and there the King, or the Lord Chancellor by his commandment, shall relate and shew the causes of calling the Parliament, the which are best founded on the words of the Writ of Summons of Parliament (which is a good Subject to treat on, &c.) and then in the conclusion of the Oration, the Commons are commanded to chuse a grand and learned man to be their Speaker. Upon which the Commons shall presently assemble themselves in the lower house, and he is to be a Member of their Parliament, and hereupon he shall disable himself, ut supra.

And two or three days after, the Commons shall present their Speaker in the upper house to the King, where he shall disable himself again to the King, and in most humble manner shall intreat the King to command them to chuse a more sufficient man: And after he is allowed by the King, then he shall make an Oration, and in the conclusion shall pray the four usual Petitions; the which Oration being answered by the Lord Chancellor, and his Petitions allowed, the Speaker and the Commons shall depart to the house of Commons, where the Speaker in the Chair shall request the Commons, that inasmuch as they have chosen him for their mouth, that they would assist him, and favourably accept his proceedings, which do proceed out of an unfeigned and sincere heart to do them Service.

Note, in the lower house, when a Bill is read, the Speaker does open the parts of the Bill, so that each Member of the house may understand the intention of each part of the Bill; and the like is done by the Lord Chancellor in the upper house; then when it is read the second time, sometimes it is ingrossed without any Commitment, but then the Speaker makes question of it in this manner: The question is, Whether this Bill shall be engrossed, or not. As many as would have the Bill ingrossed, shall say, Yea; and as many as would not, say, No.

But in the upper house of Parliament, when such question is made about engrossing, if there be no contradiction, the Lords do not deliver their assent in saying, Content, or their dissent in saying, Not content, for husbanding the time: but if there be any contradiction, it is tried Seriatim, by Content, or Not content; but neither in the upper or lower house, the Lord Chancellor or Speaker, shall not repeat a Bill or an amendment but once.

When a Bill is committed to the second reading, then if the Committees amend it in any point, then they shall write down their amendments in a paper, and shall direct to a line, and between what words the amendments shall be put in, or what words shall be interlined, and then all shall be ingrossed in a Bill.

And if a Bill pass in the Commons house, and the Lords amend the Bill when it is sent to the upper house, they do as before shew the line, and between what words, and after the amendments are ingrossed with particular references, and the Bill with the amendments are sent again to the house of Commons where they affirm them: the amendments are read three times, and then they insert them into the body of the Bill, and so è converso of a Bill which passeth first in the upper house. But note, that in one of these cases the entire Bill shall not be read again in the house wherein they first pass, but the amendments only; for no Bill shall be read above three times.

No Lord ought to speak to the Bill two times in one day: Also no Knight, Citizen or Burgess ought to speak above once to one Bill in one day, unless sometimes by way of explication.

No private Bill ought to be read before the publick Bills, unless the one house or the other do require it.

Note, in the house of Commons, those that are for the New Bill (if there be a question of voices) shall go out of the house, and those who are against the Bill, and for the Common Law or any former Law, shall sit still in the house; for they are in possession of the old Law: And in the upper house two Lords are appointed, one of the one part, the other of the other to number the voices.

In both houses, he which first stands up to speak, he shall first speak, without any difference of persons.

When a Bill is ingrossed at the third reading, it may be amended in the same house in any matter of substance, à fortiori; the error of the Clerk in the ingrossing may be amended, &c.

Pasch. 12. Jac.

Walter Chute's Case.

WAlter Chute Sewer to the King, did exhibit a Petition to the King, that for the safety of the Realm, and the security of strangers within the Realm, that the King would vouchsafe to erect a new Office of Registring of all strangers within the Realm, except Merchant-strangers, to be kept at London, and to grant the said Office to the Petitioner, with a reasonable Fee, or without a Fee: And that all strangers, except Merchant-strangers, might depart the Realm within a certain convenient time, if they do not repair to the said Register, and take a Billet under the Registers hand: Which Petition the Lords of the Council did refer to me, by their honourable Letters of the 13 of Novemb. 1613, that I calling to me Council learned in the Law, should consider what the Law is in that behalf, and how it may stand with convenience and policy of State to put the same in execution, and by whom it ought to be performed: And upon conference had with the Justices of the Common Pleas, and the other Justices and Barons of Serjeants-Inne in Fleetstreet; It was resolved, that the erection of such new Offices, for the benefit of a private man was against all Law, of what nature soever: And therefore where one Captain Lee did make suit to

New erected Office void.

the King to have a new Office to make Inventory of Goods of those who did testate or intestate: It was resolved by the Lord Chancellor and my self, that such Grant shall be utterly void, although no certain person hath it, and that this was against Common Law, and the Statute of 21 H.8. In like manner another sued to have the Registring of Birthdays, and the time of the death of each person within the Realm, and that it might be on Record and authentical: So Mich. 19 Jac. To make a new Office in the upper Bench, for the only making of all Latitats at the Suit of the Lord D'aubigny, and after him of the Lord John Hungerford, and others, was resolved to be void. So Littleton's Suit, to name an Officer to be a general Register, or rather Tabler, or Indexer of all Judgments, for Debts and Dammages, Recognizances, Bills, Obligations to the King, Deeds inrolled, Fines upon Offenders in the Star-Chamber, and other Courts whatsoever: and this was pretended to be for the benefit of the Purchaser, and the ready finding of Records; and to such purpose was made the Statute of the 27 Eliz. for inrolling of Statutes; but the Suit was rejected by the two chief Justices and others: for every Court shall chuse Officers either by Law or Prescription: the Law or Custom may not be changed without a Parliament, and so it was resolved Hill. 12 Jac. Regis; and divers other such inventions were resolved to be against Law and Record.

As to the second, in the case of Sir Walter Chute, concerning the conveniency or inconveniency of it, it was resolved, that it was inconvenient for divers causes. 1. For a private man to have private ends. 2. The numbring of strangers by a private man would infer a Terror, and the King and Princes of other Countries will take offence at it, and will do the like to the Kings Subjects. 3. It is to be considered, what breach it will be to former Treaties.

As to the third, in the case of Sir Walter Chute, that may be performed without any inconvenience; and so it was advised by the Lord Burleigh, and other Lords of the Council: An. 37 Eliz. viz. To write Letters to the Mayors, Bayliffs, or other head Officers of every City, Borough, or Town where any strangers are resident, to certifie how many Strangers, and of what quality are in their Cities, &c. the which they are to know in respect of their Inhabitants and Contributions to the poor, and other charges, and this may be done without any writing.

Which Suit being made to the Lords, was well approved by them, and the Suit utterly disallowed the 3 Dec. An. 3 H.8. Commission granted to divers, to certifie the number of Strangers, Artificers, with the number of their Servants within London, and the Suburbs thereof, &c. according to the Statutes: See Candish case 29 Eliz. for making of all Writs of Supersedeas in the Kings Bench.

13 Eliz. A grant of an Office to Thomas Knivet, to examine all his Majesties Auditors and Clerks of the Pipe concerning their Offices for years: It was resolved by the Court to be against Law, for it belongs to the Barons who are Judges: And it is also an Innovation in a Court of Justice. 25 Eliz. A grant of an Office to Thomas Leichfield to examine all deceits, false allowances of the Queens Officers for eight years, resolved to be void.

The making of Subpœna's in Chancery, anciently belonged to the six Clerks: The late Queens Majesty granted the same by Patent to one particular man.

The

The keeping and filing of Affidavits in Chancery, anciently belonged to the Register. The Kings Majesty that now is, granted the same to one particular man.

The erecting and putting down of Inns hath been anciently in the power of the Justice of Peace. His Majesty hath given that power by Patent to a particular man.

The taking of the Depositions, and all other proceedings before and by the Commission which hath used to be taken and kept by the Commissioners themselves, or some Clerk of their appointment; his Majesty hath granted the same by Patent to one particular man.

The King by his Letters Patents granted to Simon Darlington the Office of Alneger, and limited what Fees he should take.

The sole drawing, writing, and ingrossing of all Licenses and Pardons was granted to Edward Bacon Gent. with the Fee that had formerly been taken, and a restraint for all others, &c.

The Offices of Subpœna's was granted to Thomas George, and others, during life, with the Fee of 2 s. and a restraint that no others presume to make those Writs.

The Office of making and Registring all manner of Assurances and Policies, &c. was by Letters Patents granted to Richard Gandler Gent. with such Fees as the Lord Mayor and others should rate, with power to rate Fees, and a restraint of all others, &c. which was during pleasure, and afterwards to him and others during lives.

The Office of writing Tallies and Counter-Tallies granted to Sir Vincent Skinner.

The Office of ingrossing Patents to the great Seal, and an increase of Fees granted late to Sir Richard Young, and Mr. Pye. Quære.

Sir Stephen Procter's Case.

IN an Information preferred in the Star-chamber by the Attorney-general, against Stephen Procter, Berkenhead, and others, for Scandal and Conspiracy of the Earl of Northampton, and the Lord Wooton. At the hearing of this case were present eight Lords, scil. the chief Baron, the two chief Justices, two Bishops, one Baron, the Chancellor of the Exchequer, and the Lord Chancellor: And the three chief Justices, and the Temporal Barons condemned Sir Stephen Procter, and fined and imprisoned him: But the Lord Chancellor, the two Bishops, and the Chancellor of the Exchequer acquitted him. And the Question was, if Sir Stephen Procter shall be condemned or acquitted; and it seemed to some of the Clerks Prima facie, that the better shall be taken for the King, and that he shall be condemned. But others were of the contrary Opinion; and hereupon the matter was referred to the two chief Justices, calling to their assistance the Kings learned Council: And first they resolved, that this Question must be determined by the Presidents of the Court of Star-chamber, for that Court is against the Rule and Order of all other Courts, for in the Kings Bench, the Common Pleas, or the Exchequer, or in the Exchequer-chamber, where all the Justices are assembled, if the Justices are equally divided, no Judgment can be given. And so it is in the Court of Parliament; and therefore this course ought to be warranted Judges divided in the Star-chamber.

warranted by the cuſtome of the Court: And as to that, two Preſidents only were produced for the maintenance of the ſaid Cuſtome, viz. One in the Hilary Term, 39 Eliz. between Gibſon Plaintiff, and Griffith and others Defendants; where the complaint was for a Riot, and at the hearing of the caſe, there was eight preſent, four gave their Judgments that the Defendants were guilty; but the other four, whereof the Lord Chancellor was one, pronounced the Defendants not guilty, and no ſentence of condemnation was ever entred, becauſe the Lord Chancellor was one of the four who acquitted them. The other was Hill. 45 Eliz. in an Information by the Attorney-general againſt Katharine and others, for forging of a Will, and a Miſdemeanor for procuring a fraudulent Deed to defeat the Queen of her Eſcheat: And eight were in preſence at the hearing of the cauſe, whereof four found the Defendants guilty of Forgery, and did inflict the puniſhment according to the Statute of the 5 Eliz. but the others, whereof the Lord Chancellor was one, gave ſentence, that the Defendants were guilty of the Miſdemeanor, and not of the Forgery, and impoſed a Fine of 500 l. only: which decree was entred according to the Lord Chancellor's voice, although the ſentence on the other ſide was more beneficial for the King, and no other preſident could be found in this caſe, the which I have reported this Term.

Concerning Benevolence.

NOte, the Exaction under the good name of Benevolence, began in this manner:

When King Edward the fourth had a Subſidy granted to him in the 12 Edw. 4. by Parliament, becauſe he could have no more by Parliament, and without a Parliament he could not have any Subſidy to be levied of the Lands and Goods of the Subject, he invented this ſhift or device, in which three things are to be obſerved:

1. The Cauſe.
2. The Invention.
3. The Succeſs.

Hollingſhead, 11 Ed. 4. 694. Stow 701.

1. the Duke of Burgundy, who had married Margaret, the Siſter of Edw. 4. ſolicited King Edward to joyn in War with him againſt the French King, to which the King eaſily conſented, becauſe he ſought revenge againſt the French King for aiding the Earl of Warwick, Queen Margaret, and Prince Edward, and their party; and therefore, to make War againſt the French King was the cauſe.

2. The Invention was, The King called before him at ſeveral times a great number of the Wealthieſt of his Subjects, to declare to them his neceſſity, and his purpoſe to levy War for the honour and ſafety of the Kingdom, and demanded of each of them a certain Sum of Mony, and the King treated with them, with ſuch great grace and clemency, and with ſuch gentle prayer to aſſiſt him in his neceſſity, for the Honour of the Realm, that they very freely yielded to his requeſt, for the honour and ſafety of the Realm; amongſt the reſt, there was a Widow of a very good Eſtate, of whom the King meerly asked, what ſhe would willingly give him for the maintenance of his Wars; By my faith, quoth ſhe, for your lovely countenance ſake, you ſhall have twenty pound, which was more than the King expected; the King thanked her, and vouchſafed to kiſs her, upon which ſhe preſently ſwore, he ſhould have twenty pound more.

3. The ſucceſs and event was, That whereas the King called this a Benevolence to pleaſe the people, yet many of the people did much grudge at it, and called it a Malevolence.

Primo

Primo Ed.5. in the Oration of the Duke of Buckingham in Guild-Hall in London, he inveighed, amongst other things, against this Taxation under the name of Benevolence, 1 Rich.3. cap.2. the Subjects of the Realm shall not be charged with such charge or imposition called Benevolence, which tendeth to the subversion of the Law, and destruction of Commonalty, as appears in the Preamble (where any such charge.) And that such exaction before taken, under the name of Benevolence, shall not be drawn into example to make such or the like charge, but shall be damned and annulled for ever: But it appears by the Preamble, that this was against the will and liberty of the Subject, but free-will offering is not restrained.

An. 6 H.7. The King declared in Parliament, that he had just cause of War against the French King, which for the causes there shewn was approved, and for that he desired a Benevolence towards the maintenance of it; and every one promised his helping-hand, the which the King greatly commended; and to the intent that the power sort might be spared, he demanded it by way of a Benevolence, according to the example of Edw. 4. and published, that he would by their open hands measure their benevolent hearts; and he who gives but a little, according to his gift.

By this means he collected great Sums of Money, with some grudge for the extremity shewn by the Commissioners, 11 H.7. cap. 20. An Act was made for levying of that Benevolence, according to their assent, but only of such as assented.

An. 20 H.7. A Commission to levy what was granted by 11 H.7.

Note, that 15 H. 8. a Commission under the great Seal, called a Commission of Anticipation, to collect the Subsidy before the day. Stow.880.

An.16 H.8. For War with France, a Benevolence levied by Commission with great Curses and Imprecations against the Council, and with success, for it was to levy a sixth part of the value in Money or Plate against the good will of the Subject.

An.26 H.8. Another Benevolence levied by Commission for maintenance of War against France, with ill success, for it was exacted of the Subject against his good will. But if the Subjects of their free-will, without any compulsion, will give to the King for publick uses any Sums of Money, this is not prohibited by any Statute.

And the Statute 11 H. 7. cap. 18. proves this, where the Parliament compels them who have freely granted any thing to the King for publick use, to pay it.

Feb. An. 40 Eliz. It was resolved by all the Justices and Barons, that a free Grant to the Queen without coercion is lawful, and accordingly they granted to the Queen, Quod nota bene, quia, &c.

Pasch.

Pasch. 12. Jac. Regis.

THe Case of Dungannon in Ireland; The case of the new Corporation of Dungannon in Ireland was in effect, scil. That the King constituted the Town of Dungannon to be a free Borough, Et ulterius volumus, declaramus, & statuimus, quod inhabitantes villæ prædictæ sint unum corpus corporatum per nomen Præpositi 12. Burgensium & Communitatis Dungannon, & per idem nomen placitare possit: Et quod ipsi prædicti præpositi & Burgenses & successores sui habeant potestatem eligendi duos Burgenses,&c. ad Parliamentum,&c. And the doubt was, whether this Grant of Election of Burgesses of Parliament was good, for because it was granted but to parcel of the Body, scil. To the Provost and Burgesses, and not to the Provost, Burgesses, and Commonalty; And the chief Baron thought, that forasmuch as this was not but a nomination or election, it was sufficient to make the Provost and Burgesses only to have it: And he took a diversity betwixt nomination and other inheritance: But this was denied by all the Justices and Barons, for this power to elect Burgesses, is an Inheritance of which the Provost and Burgesses are not capable, for that it ought to be vested in the entire Corporation, scil. Provost, Burgesses, and Commonalty: And it seemed to Hubbard, chief Justice of the Common Pleas, that the King may grant to the Inhabitants of Islington to be a free Borough; and that the Burgesses of the same Town may elect two Burgesses to Parliament: And that it shall be good, although that the Burgesses be not incorporated; for there are many Burgesses who elect Burgesses to the Parliament, which are not incorporate: But it was resolved by all, that such a Grant made by the King should be void; for the Inhabitants have not capacity to take an Inheritance, as in the 15 Ed.4. to have Common: And Littleton saith in his Chap. of Burgage, that the Boroughs which send Burgesses to Parliament, were the most ancient and principal Cities, &c. So that it shall be intended, that at the first they were incorporate. Also, Plus valet sæpenumero vulgaris consuetudo, quàm Regalis concessio.

But it was resolved by Hubbard, Tanfield, Altham, Winch, Nichols, and Haughton, Quod volumus, was a good word of Grant, as Pigot was of Opinion: 21 Edw.4. And this shall be an implyed Grant to all the Corporation, that the Provost and Burgesses shall elect, &c. And regularly, when the Grant is indefinite, scil. First, Concedimus an incertain thing, Et ulterius quod Præpositus, & Burgenses, & Successores, sui elegerint, this shall be within the first Concedimus to all the Body, which that party shall chuse: But the chief Justice of England, and Doderidge thought the contrary, for in this case there was but an Ordinance to erect the Corporation; and no grant altogether to any person, so that this clause, Et quod,&c. is idle and vain.

And Note, all the new Corporations were of the same form, and in none of them is any clause to elect new Burgesses, so that when those of the modern Burgesses die, this power to elect Burgesses is gone.

Mich 12. Jac. Regis.

A Question was moved to the chief Baron, and the Justices of Serjeants Inn in Chancery Lane; That if a Felon be convict either by verdict or confession, If immediately by his conviction, his Goods and Chattels be forfeited: And it was said, that if the Felon after his conviction pray his Clergy, that then clearly he shall forfeit his Goods and Chattels, for Quodammodo this is a slight, because he refuseth to be adjudged by the common Law, and flies to the priviledge of the holy Chuch. But it was resolved by the chief Baron and the Justices, that immediately by his conviction his Goods and Chattels are forfeited; and the praying of his Clergy is not any forfeiture, for then in case where he cannot have his Clergy, he forfeits nothing untill his Attainder, which none will affirm. And with this agrees Stamford. fol. 192.a. where he saies, that the Goods of a Felon are forfeited, which he hath the day of the verdict given; and this is proved also by the Statute of 1 R. 3. where it is admitted, that the Goods of a Felon convict are forfeited and may be seised. And of the same Opinion was the chief Justice, and the Justices of Serjeants in FleetStreet: vid. Trin. 41. Eliz. 332.

Mich. 12. Jac. Regis.

Anne Hungate's Case in Cam. stell.

IN this very Term a great case was heard and determined in the Star-Chamber, between Sir Henry Day, who dyed, pendent the Bill, and Anne his Wife, and Nicolas Bedingfield Esquire, and Elizabeth his Wife, Plaintiffs: And Anne Hungate Widdow, Sir Robert Wind, Henry Branthwait Esquire, Thomas Townsend Esquire Thomas Blomfield Gent, and George Min Gent. Defendants; and the case in effect was: That Henry Hoogan Esquire, being seised of the Mannor of Hamonds, and of divers Lands of East Bradenham, &c. in the County of Norfolke in Fee, by Deed made a Feoffment of them to the use of the said Anne who took Hungate to Husband, and She had Issue by him a Son and a Daughter, and he dyed: And Anne obtained a Grant of the Wardship of the Son, and after when the Son was of the Age of one and twenty years, saving six weeks, By Dedimus potestatem, directed to Sir Robert Wind, Henry Branthwait then Feodary, and Thomas Townsend, they took Cognizance of a Fine of the said Son, being then of the age aforesaid, and sick: And the Bill charged them all with practice in procuring the said Son to acknowledge the Fine; they all knowing that the said Son was within age, and in Ward of the King in Custody of the said Anne: But there was not any practice or circumvention used by any of the Defendants to procure the said Son to acknowledge the same, but the Son of his owne good will levied it. And by Indenture the use was limited to his Mother, the said Anne and her Heirs, with power of revocation by the

Son upon tender of ten shillings &c. and this was in consideration, that the Mother had paid the Debts of his Father to a very great value, and had obtained the Wardship of him, and that her Joynture should be confirmed; And that his Mother, if she pleased might give it to his Brother which she had by Hungate, who was of half blood; and it appeared that the Mother knew the Son to be within age, but the Commissioners, for any thing that was proved, were ignorant of it, nor did they send for the Book of the Church, in which his age appeared being in the same Parish.

And the Council for the Plaintiff prayed, that the Defendants should be punished for their misdemeanor; and that the said Women being Plaintiffs, who were Cosins. &c. Heirs to the said Son, of the entire Blood, who should be disinherited by the said Fine. To which it was resolved by the two chief Justices, and the chief Baron, that there was not any crime punishable by the Law in this case: For the Judges of Law, and of this Court may punish such Offences, & Crimes as are determinable in this Court: But the Judges cannot create Offences, nor do as Hannibal did, to make his way over the Alpes, when he could find none, for Judicandum enim legibus; et ubi non est lex, nec est transgresio: And for this, when the Infant levied the Fine, if it be not reversed during his minority, the Fine is unavoidable in Law, and the Heirs of the Infant have not any remedy by the Law to reverse it, the cause is for this, that the age of the Infant is not to be tried but by inspection of his person: Non testium testimonio, non juratorum veredicto, sed judicis inspectione solummodo: But the Judges as by adjuncula, may inform themselves by Witnesses, Church Books, &c. And the reason of it is, that the Fine should otherwise as well lose its effects as its name, for Dicitur finis ab effectu; quia finem litibus imponit; And if Infancy should be tryed otherwise then by inspection, no man shall be sure of his Inheritance: for after the death of the Cognizor, averment may be made many years after: That the Cognizor was within age at the time of the Fine; and so many records avoided by naked averment, which should be against Law, and the cause of great vexation and suit, and Fitz. N.B. fol. 21. If an Infant levy Fine, he shall have a Writ of Error during his non-age, and assign it for Error; and this is Error of the Court in Law, and shall be tried by the Judges of Law.

And for this it was resolved by the said Justices, That forasmuch as no corruption and circumvention was proved in the Commissioners, or in any of the parties, of which they may be indicted at the Suit of the King, or punished in this Court, but the Fine shall stand.

And it was not apparent to the Commissioners, that he was within age, forasmuch as he wanted but six weeks of his full age, but if the Commissioners had knowledge that he was within Age; then this had been misdemeanor in them: For it was said, that Fines and Recoveries are like to the Pole Artique and Antartique, for upon these assurances of lives depends; for which by naked averment they cannot be shaken or impeached, for which divers notable Presidents have been concerning the matter in question in this Court.

And for this, in this Court, Mich. 24. and 25 Eliz. 14. between William Cavendish and Anne his wife one of the Co-heirs of Henry Knightley, against Robert Worsley, and Katharine Lanter Co-heir, and Trafford, and other Defendants. And the case was: That Robert Worsley and Katharine his Wife being within age acknowledged a note of a Fine before Trafford, and another of the Defendants, by Dedimus Potestatem: And the Decree said, that the Commissioners did perfectly know that the said Katharine was within age; And for this cause every one of them was fined, but the Fine stands.

Mich.

Mich. 38, and 39. Eliz. In this Court one Alexander Gilderbrand being seised of certain Lands in Windham, in Com. Norf. in Fee, one Hubbard procured one Roger who was in his Custody in his House, to take upon him the Name of Alexander Gilderbrand, who was then beyond the Seas, to acknowledge a Fine to the said Hubbard of the said Lands, and they were fined in this Court; And it was part of the Sentence, that if he did not re-assure the Land to the said Alexander, he should forfeit a greater Fine to the Queen: But there was no Sentence to draw the Fine off from the File, nor Damages awarded to the said Alexander, who was the party grieved.

Mich. 12. Jac. Regis.

Mansfield's Case

AN. 23 Eliz. In the Court of Wards, the case was this; That Henry Bushley seised in Fee of certain Lands in North Mins in the County of Hertford, by his Will in writing demised the said Lands to Henry Bushley his Son in taile, the remainder to one William Bushley.

And for this, that his son was within age, he demised the Education of him to Thomas Harrison, whom he made his Executor: And afterwards it hapned, that Henry the Son became a monstrous and deformed Cripple and proved an Idiot, à nativitate; The which Idiot by the practice of one Nicols and others, was ravished & taken out of the custody of his Guardian, and was carried upon mens shoulders to a place unknown, & there kept in secret, untill he had acknowledged a Fine of his Lands to one Bothome, before Justice Southcot. An. 9. Reg. Eliz. and by Indenture betwixt them, the use of the said Fine was declared to the use of the Cognizee and his Heirs, which Bothome, An. 12 Eliz. conveyed the said Land to one Henry Mansfield: And An. 12 Eliz. the said Henry Bushley the Son, by inquisition was found an Idiot a nativitate; and upon this in An 33. the Court of Wards took order for the Possession of the said Lands, Vide Calver's case in my Reports.

And it was moved as a doubt in the said Court of Wards, whether the said Fine should be to the use of the said Idiot and his Heirs, for notwithstanding that the Fine which is of Record binds the Idiot for the causes aforesaid, yet the Indentures are not sufficient to direct the uses: But it was resolved, that for as much as he was enabled by the Fine as to the Principal, he shall not be disabled to limit the uses which are but as accessory.

And the same is the Law of an Infant and Feme Covert. And the said Mansfield brought an Action of Trespass in the common Pleas against one Trott, the Farmer of the said Lands, and the Issue was to be tried at the Bar; And the said deformed Idiot was sent out of the Court of Wards, to be shewn to the Judges of the common Pleas, and to the Jurors there tried and sworn: and being brought upon a mans shoulders, the Judges hearing that the Title of Mansfield was under the said Fine levied by that Idiot, The Lord Dyer, and the Court by consent of parties,

sed a Juror to be withdrawn; And the Lord Dyer said, that the Judge who took the Fine, was never worthy to take another; but notwithstanding this, and although the monstrous deformity and idiocy of Bushley was apparent and visible, yet the Fine stood good.

Mich. 12. Jac.

Warcombe and Carrel's Case.

20 OCt. 6 Eliz. in the Star Chamber, where were present Sir Nicolas Bacon Knight, Keeper of the great Seal, the Marquess of Northampton, the Earl of Westmerland, the Earl of Sussex, the Earl of Leicester, Lord Clynton, high Admiral, Lord Strange, and Hunsden, Progers Knight, Controller of the Houshold, Sir Francis Knols, Secretary, Sir William Peeters, Sir John Mason, Sir Richard Sackvil, under Treasurer of the Exchequer, Sir Robert Catlin, Master of the Rolls, Sir James Dyer, Justice del Banc. The cause was, That Edward Carrel, an Apprentice of the Laws, for a great Sum of Money bought the Wardship of Johan, Daughter and Heir of Waincomb, of the County of Hereford, and married her to Edward Carrel, his youngest Son: And after Hil. An. 5 Eliz. the said Johan fell sick, and being of the age of nineteen years, and not having any Issue, the said Edward her Husband perswaded her to acknowledge a Fine of her Inheritance, by which should be conveyed an Estate to the Husband and Wife intail, the remainder to the right Heirs of the Wife: And Cognizans was taken by Dedimus potestatem directed to Sir Tho. Sanders and one Chesnel of Grayes-Inne before Easter, divers Judges being here who might have examined her: And on Friday in Easter week she died, but the Fine and l'argent du Roigne, was entred as of the last Term, Scil. The Term of St Hillary four daies before the death of the Wife.

And the Original Writ of Covenant bore teste 15 Jan. returnable crastino Pur. and the Dedimus potestatem 18 die Jan. And James Warcomb Cosin and Heir of the said Johan, complained by Bill against Edward Carrel for obtaining of the said Fine by indirect practice; And thereupon the sentence of the Honourable Court ensued thus.

This day a right Honourable presence being assembled in this Court, the matter depending in the same, between James Warcomb Esquire, Complainant and Edward Carrel of London Gent. Defendant, as well for and concerning the validity of the fine levied by the said Edward Carrel, and Johan his late Wife of certain Mannors: &c. of the inheritance of the said Johan, which Johan, as the Plaintiff doth alledg, was not of full age at the time of the Fine levied; as also for certain sinister and undue means committed and done by the said Edward Carrel, in the suing and getting out of the said Fine, as is supposed and alledged by the said Complainant, was by great and long deliberation heard and examined, with all the allegations and sayings, that could be alledged and said on both parts.

Upon

Upon hearing of which matter the ſaid Fine was by the whole opinion of the Court adjudged good, available, and effectuall in the Law.

And alſo no fault adjudged to be in the ſaid Edward Carrel, in the ſuing and getting out of the ſaid Fine, but that the ſame was duly and orderly ſued out, according to the due form and order of the Lawes of this Realm And all this is within the Rule, Facta tenent multa, quæ fieri prohibentur; And the Heir hath Damnum abſque injuria, for the Law doth not give him any remedy to reverſe it, And as Edward Carrel was not puniſhed, although that he knew that his Wife was within age: ſo the ſaid Hungate ſhall not be puniſhed; although that ſhe knew that her Son was within age; and that the rather, by reaſon of the ancient Verſe.

Leges communes ſi neſcit fœmina, miles,
Clericus, & Cultor, Judex ſibi parcet & ultor.

And by ſentence all were diſmiſſed, &c.

Amongſt the Records in the Treaſury, Et inter placita coram Domino Rege de termino Sancti Mich. An. 42 Ed. 3. Rot. 27.

Cornubia Helena, filia Hugonis Allot, brought an appeal of Robbery againſt Laurence Boskoſleake, Richard Cohorta: Jo. Gilmin, and Johan his Wife, and divers others; the Defendants pleaded Not guilty, &c. and were found not guilty of the Felony aforeſaid, Nec unquam ſe ſubtraxerunt, ideo prædictus Laurentius & omnes alii, &c eunt inde quieti: Et prædicta Helena pro falſo appello ſuo committitur priſonæ in Cuſtodia Mareſcalli Ric. de Inworth, Mareſcalli, &c. Et ſuper hoc præd. Cus Laurentius & alii petunt juxta formam ſtatuti quod Juratores hoc inquirant quæ damna prædictus Laurentius & alij ſuſtinuerunt occaſione falſi appelli predicti: Et ſi prædicta Helena ſit ſufficiens ad damna ſolvenda: Et ſuper hoc quæſitum eſt à præfatis Juratoribus quæ damna prædictus Laurentius & alij ſuſtinuerunt ſingulatim occaſione prædicta. Qui dicunt quod prædictus Laurentius ſuſtinuit damna ad valentiam 10 l. Et Richardus Cohorta ad valentiam 10 l. & Johannes Gilman 5 l. & Johanna uxor dicti Johannis Gilman 5 l. & ſic ſingulatim de cæteris: Quæſitum eſt ſi prædicta Helena ſit ſufficiens ad aliqua damna ſolvenda. Qui dicunt, quod non. Quæſitum, quis vel qui abbettavit vel abbettaverunt præfatam Helenam ad appellationem prædictam proſequendam. Qui dicunt, quod Johannes Riddel ſenior, Johannes Riddel junior, Tho. Drury & Alicia Allet abbettaverunt præfatam Helenam, ideo ipli diſtringuntur ſecundum formam ſtatuti ad reſpondendum, &c. Out of which Record theſe things are to be obſerved.

1. Although it is enacted by the Statute of Weſt. 2. cap. 21. That in this caſe Juſticiarij, &c. puniant appellatorem per priſonam unius Anni, &c. and according to the Court committed to Priſon, &c. ſo that they were not bayliable, yet Quia eadem Helena prægnans fuit & in periculo mortis; She was let out upon Main-prize to have her body, 15 Mich. ad ſatisfaciendum prædicto Laurentio & aliis de damnis ſingulatim adjudicatis occaſione prædicta: And the reaſon of this is, for this, that the common Law requires in every caſe convenience; and it is inconvenient that a woman with Child ſhould remain in common Goal Sub Salva & arcta cuſtodia, where women cannot reſort to her upon times as neceſſity ſhall require forthwith for convenience, & principally where it is for avoiding the danger of death, the Court hath

hath power to put her Main-prise untill she be delivered; for it ought to be a truth concerning the Judges of the common Law, which the Moral Poet hath spoken, Reddere personæ scit convenientia cuique: And with it agrees that advice which Bracton gives to the Judges, lib. 2. cap. 2.

Considerent Judices efficaciter quid oportuerit secundum necessitatem, quid expedierit secundum utilitatem, quid ligatum fuit secundum permissionem, & quid deceat secundum honestatem,

2. That the Defendants recover their damages either wholly against the Principal, or wholly against the Abbettors, and not part against the one and part against the other; and that the Record is Quæsitum est, si prædicta Helena est sufficiens ad aliqua damna solvenda: And with this 'tis agreed in 8 Ed.4.3.

3. Although that the Statute saith, Restituant Appellatores damna appellatis, yet the damages shall be singulatim assessed: for that the words are further, Secundum discretionem Justiciariorum, habito respectu ad prisonam vel arestationem, &c. So that forasmuch as the causes of damages are several, as the defamation, &c. of the one may be greater than of the other, and the damages of the one may be greater than of the other.

4. That although that the Appellor be not sufficient for to pay, yet his body shall be taken ad satisfaciendum. Quia qui non habet in ære, luet in Corpore.

5. That although that Jurors in the appeal have found the Defendants Abbettors, yet insomuch as they are strangers to the Original, they shall not be concluded, for they shall be distrained ad respondendum: And to that they may plead not guilty, or other plea: Quia res inter alios actæ alteri nocere non debent.

Vide the Book of Entries, Title, Appeal divisione damages 1, & 2. And this doth appear also by the said Statute which sayes, that Si Abettor convictus sit de hujusmodi Abettat. per malitiam puniatur per prisonam & tenetur ad restitutionem damnorum faciendam.

Placita coram Rege apud Ebor. in Crastino Sancti Trin. An. 7 Ed. 3. 44. Divisione Indictment aer very worthy of observation; The effect of one Indictment was Quod ubi quidem Robertus de Bayons de Tunelby captus fuit & in prisona Castri London detentus pro quodam debito statuti mercatorij in Custodia Thomæ Botelier Constabularij Castri de London ubi ipse Thomas le Botelier posuit ipsum Robertum in profundo Gaolo, inter Lenones & vili prisona contra formam statuti, &c. viz. de 1 Ed. 3. Et eodem profundo detinuit quousque idem Robertus fecit finem cum eo de 40 s. quos ei solvit & hoc per exactionem.

Dures

Duresse per Goalor.

ITem presentant, That one Wellingoner was arrested for Trespas at the Suit of James Cantelupe, and detained in the said Goal, the said Thomas for forty shillings, Ad largum ire permisit: Idem Wellingoner ire non potuit quousque finem fecit cum Roberto de Barton Clerico de dimidio Marcæ quod ei solvit & ulterius pro ferris.

Item presentant, That one John Aylmer of Digby purchased of Thomas Lord of Bardolfe one Messuage, &c. Ibi venit Magister Clericus Eschetoris colore officij sui, & absque aliqua causa dictam terram seisinit in manus Domini Regis, & noluit ipsum Johannem permittere terram suam prædictam quousque Idem Johannes finem feciſſet cum prædicto Magistro Roberto pro 40 s. quos cepit per extortionem & nunc manum suam amovit.

Item presentant, quod ubi Thomas Balivus Wapentachiæ de Flaxwel & Laughton, tenet Wapentachiam suam super proclamationem, & illa proclamatio debet fieri solenniter in villa de Lasford & Kirkby, super quam proclamationem homines Wapentachiæ possent pervenire ibi: Predictus Tho: non fecit Proclamationes suas, per quod homines patriæ amerciati sunt graviter, & huiusmodi amerciamenta de ijs levata fuerint, & hoc per extortionem: To which he appeared and pleaded not guilty, and was found guilty, and fined and imprisoned.

Item presentant, quod Thomas de Maudon Balivus Wapentachiæ de Boby & Grafton. tenere debuisset 2. Wapentachia in diversis locis ad aciamentum patriæ prout de Jure deberet. Idem Thomas tenebat ambo Wappentachia in uno loco, ad maximum damnumpopuli Wapentachiæ prædictæ, & homines eorundem Wapentachiorum nimis excessive fuerint amerciati.

Item Thomas Carleton under Sheriff of the County of Lincoln, was indicted for this, that one Barthol. de Lotgrave purchased a Writ against Nicolas de Notthingham, and delivered the said Writ to the said Sheriff, who returned a Tarde upon the said Writ, although the said Writ was sufficiently in time delivered: Et sic fecit iterum, &c.

Item Hugo de Baxter Latro notorius indictatus de Felonia non fuit replegiabilis & quod malæ famæ extitit.

IN an Action sur le Case, it was resolved per totam Curiam, that if a Sumner return one certified upon his Oath in Court Christian, where in truth he was not, and he is pronounced Contumax, and after he is excommunicated, he shall have an Action sur le Case, for here is Injuria & damnum. And in such case the Plaintiff shall have Judgment to recover, for although that the proceeding and Oath touching this matter are Ecclesiastical, yet the damage is temporal, for he is disabled to sue in any Court.

And it was resolved, that Perjury, by which Damages do accrue, may be punished as a misdemeanor at the suit of the King.

And

And also the party may have his Action upon the Case to recover Damages, for it should be a very great defect in the Law, and encouragement to the parties, if men may commit Perjury with impunity: And for that reason, if Jurors use Perjury themselves, an Attaint lyeth at the Common Law, for so it appears by Glanvil, lib. 2. cap. 29. 15 H. 8. title Attaint 75. 6. H. 3. ib. 73. & 75. and in the time of Ed. 1. Attaint 70. for the first Act which gave the attaint; the Statute of West. 1 cap. 38. vid. F. N. B. 109. vid. 2. 7. H. 6. 25. one who was to be a pledge affirmed upon his Oath, that he could dispend forty shillings per annum, and upon re-examination he confessed it false, for which he was committed to the Fleet untill he made a Fine, which proves that the false Oath was the wrong and injury, and punishable by the Law, Et ex consequenti, when Damages follow to the party, he shall have remedy by Action upon the case.

In like manner it was agreed, that if one make a false Affidavit, by which the party is arrested and molested by process of contempt, he may have an action sur le case, and recover damages. And although that when the matter is meer Ecclesiastical, the Court Christian may punish Pro salute animæ, yet they cannot award any damages to the party, for if one within holy Order be beaten, they may proceed, against the Delinquent Pro salute animæ, but the Priest ought to recover his damages by action of Battery, So notwithstanding that they may punish the said Sumner in the case at the Bar, for Perjury and false certificate, yet the party grieved shall recover his Damages at the common Law: And although the matter be meer Ecclesiastical, yet if the party grieved hath damages, either by any wrongful proceedings of the Judge, or Mis-fealans, or non-fealans, or Falsity of any Minister, or by unjust prosecution of the party, the party grieved may have an action sur le case, and recover his damages.

Doctor and Student 118, 119. Action sur le case, lyeth against the Ordinary, for a wrongful excommunication touching any thing out of his Jurisdiction, so there many other good cases: And the case in Fitz. 47. H. 6. 8. If an Arch deacon refuse to induct the Clerk, &c. he shall have an action upon the case, which was affirmed for good Law by all the Court, with which agrees 26 H. 8. 3. a. and true it is, that it is held in 38 H. 6. 14. That in such case he shall have remedy against the Arch deacon to punish him; but saving the opinion there, they cannot award him damages in such case, but he shall recover them at common Law: So F. N. B. 92. If a man proceed against a Prohibition, the party may have an action upon the case against him for prosecuting in Court Christian, vide Trin. 20. Ed. 3. Rot. 46. in the Treasury: Richard Tresils Case, there he recovered Damages against the Bishop of Norwich, by him excommunicated after Prohibition, Episcopus adjudicatur esse illicitum expugnatorem Authoritatis Regiæ, & querens recuperavit decem mille libras, simile Pasch. 13 Ed. 3. Rot. 78. Philip de Hardelshals case, Hil. 32 Ed. 3. Rot. 78. Sir Tho. Seaton Knight, recovered against Lucy who was the Wife of Robert Cockside for suing to Rome pro transgressione facta per ipsum Thomam, pro captione bonorum & catallorum suorum & pro debitis & inde pronunciari fecit sententiam excommunicationis, &c. he recovered by Verdict Damages to three thousand pound, &c. Trin. 37 Ed. 1. Costs were recovered against the Arch bishop of Canterbury, forty pound pro damnis, per quod ipsum excommunicavit pro executione brevis Regis pro manu fortia amovenda. Ideo Episcopus capt. Mich. 29 Ed. 3. Rot. 19. similiter: And divers other Records you may see in my Book of Presidents.

Pasch.

Pasch. 14. Jac.

A Habeas Corpus to the Marshall of the Admiralty granted in Hill. Term last past, for Haukeridge, Prisoner in the custody of the said Marshal, who did return, Quædam causa spolii, &c. contra Haukeridge pendet inde si pro judicio & sententia paratus sit, &c. Qui quidem Will. Haukeridge sic commissus remanet, donec ante dicta Causa per præfatum Daniel Dun fuerit, Et hæc est causa. And also upon another Habeas Corpus, he made such a return, and otherwise parata sit, &c. which the Court took to be very insufficient, and gave divers days to amend the return, and to shew the cause of delay, and for why sentence was not given, forasmuch as sententia fuit parata, or otherwise a man may be in perpetual Prison: And the Marshal would not amend his return, upon which the party being in Prison sixten or eighten weeks, always the return was est parabeta, &c. so the cause was long Parata ad judicium, sed nunquâ judicata: And after in another Writ returnable Crastino Ascensionis, was another return of Parata, &c. without shewing cause of delay: Also it seems the return was insufficient for another cause, viz. Quædam causa spolii civilis & maritima quæ coram &c. which is too general for two causes.

1. For that [spolii] is uncertain, and ought to be specified in some more certainty of what things, or of, or in what things in particular, and does not shew any value of the Goods.

2. That Maritima est super littus, or in portu maris, for those appertain or are next to the Sea, and yet the Admiral hath not Jurisdiction Super littus maris or in portu, for that they are Infra corpus Comitatus, as appears in many Books and Records. And so it was adjudged in Lacy's case, that Infra the high water mark, and low water mark, when the Sea is at an Ebb, it is within the body of the County, Dyer 15 Eliz. the Abbot of Ranfey's case, yet this is Maritima, 15 Eliz. Dyer, fol. 326. Pasch. 17 Eliz. in Scaccario ac contra Diggs, for which cause he ought to have said, Super altum mare, infra jurisdictionem Admiralli; for the Statutes of 13 R. 2. cap. 5. 2 H. 4. cap. 11. 19 H. 6, 7. confine him only super altum mare: And the Return which concerns the Imprisonment of the body ought to be certain.

But for the first, all the Court resolved, that it was insufficient: Also there was shewn no time of the spoil; and for this, in the same Term, for the insufficiency of the Return which the Court could not obtain to be amended, the said Haukeridge was bailed in open Court until the next Term: Also the words are, Quædam causa spolii ac civilis ac maritima, vid. 28 H. 8. cap. 15. that upon an insufficient Return the party ought to be bailed or discharged, all our Books and infinite Presidents are, vide 6 H. 6. 44. otherwise if the Return shall be sufficient when it is false. And note the proceeding was Civiliter, for to have restitution, & non Criminaliter.

Note, that it was said by some, that when Judgment is given, that one shall be hanged until he be dead; the King cannot alter the Judgment, and command that he shall be beheaded, for that the execution ought to be conform to the Judgment: and with this accords 35 H. 6. fol. 58. & Stamford lib. 1, fol. 13. vide 27 Ass. pl. 41. vide F. N. B. 144. where it seems that he may be beheaded, 22 Ass. pl. 49. One was beheaded for killing of Adam Walton, the Kings Messenger, which is there taken for petit Treason. But when one is attaint of Treason, his judgment is to be hanged by the neck, and cut down alive, and his Entrails and privy members cut

off from his body, and burnt in his sight, his head to be cut off, his body to be divided into four parts, and disposed of at the Kings will, so that in such case the King may pardon all the execution, but Decapitation, for this is parcel of the Judgment; and the King may pardon all or any part at his pleasure; And it was resolved that the Duke of Somerset, forasmuch as his Judgment was to be hanged by the neck, could not be beheaded, for that would alter the Judgment. And so it was resolved in the case of the Lord Sturton in the time of Quæn Mary, and of the Lord Dacres in the time of H.8, both which were hanged for Felony.

It was resolved also, that King H.8. could not by the Law behead his Wives for Treason, for Judicandum est legibus, non exemplis.

And note, that when a Noble man is attaint of Treason, and hath this Judgment as is aforesaid; the course is, that the King makes his Letters Patents directed to the Lord Chancellor of England, reciting the Attainder; yet we minding to dispence with that manner of execution of Judgment, in respect that the said A.B. is a Noble man, do therefore by these presents remit and release the said A.B. of and from such execution of Judgment, and instead thereof, our pleasure is, to have the head of the said A.B. cut off, &c. as in such cases hath been used, touching or concerning Noble men: And by the same do require the Lord Chancellor to make two Writs under the Great Seal, one to the Lieutenant to deliver the said Prisoner, and the other to the Sheriff of London, to receive and execute the said Prisoner, &c. And the case of the Lord Sanchez was stronger, for that he was not Noble within England.

Trin. 9. Jac. Regis.

IN this very Term, I moved the Justices in Serjeants-Inne in Fleet-street, upon the Statute An.7.Jac.cap.6. which gave power to two Justices of Peace, to require any person or persons, &c. and in some cases one Justice of Peace only, if the Justices of Peace may make a special Warrant to Constables, &c. to have the bodies of parties, who are to take the Oath according to the Statute before them. And it was resolved by all una voce, that they may, and that for two reasons:

1. When the Statute gave power to Justices of Peace to require any person or persons, &c. to take the Oath, the Law implicitè gave them power to make a Warrant to have the body before them, for Quando lex aliquid alicui concedit, conceditur & id sine quo res ipsa esse non potest.

2. It is against the Offices of the Justices, and of the authority given them by the Statute, that they shall go and seek the parties: And principally in a case of so great consequence. Then I moved, if in such case the Constables may break the houses of the parties named in their Warrants: And it seemed to us all that they cannot, for that they are not any Offenders until they refuse to take the Oath before them who have authority to tender it to them, or commit some contempt to the King; And insomuch as they are not yet Offenders, nor are indicted nor charged by any matter of Record, their houses cannot be broken by Warrant made by construction upon the Statute, by which authority is given, &c. to require them to take the Oath, vid. Statute 7 Jac. and see in it, that Baron and Baronnesses, as to the tender of the Oath, need not to be indicted, &c. for

for these words, Of or above the said age or degree, are to be intended of the said age, and above the said degree, or otherwise the first clause concerning Barons should be idle, vide those who have power to tender the Oath to them of the Nobility, have power to commit them upon refusal to the Common Goal, by the general Act; and if any person or persons being of the age of eighteen years, or above, shall refuse to take the said Oath duly tendred, &c. which clause extends to all before.

Note, if the person be fugitive in another County, he evades the Statute for the present; but he may be indicted for recusancy, and the Indictment may be removed into the Kings Bench, and they may make process against them in any County of England: Also if they are in their houses the door being shut, &c. then they may be indicted either before the Justices of Assize, or before the Justices of Peace at the quarter Sessions, and then after a Venire facias, &c. by force of a Capias, their houses may be broken by the Sheriff, vide Statute 10 Eliz. cap. 2. (to which the Statute of 23 Eliz. refers, &c.) such process is given in case of not repairing to Church, &c. as in Indictment of Trespass which is Ven. fac. cap. &c.

Memorandum Hill. Term 9 Jac. all the Justices of England by commandment of the King, signified by the Lord Chancellor, were assembled to have consideration of these two Statutes. And in the beginning of this Term, the said points were recited and debated, and after good consideration severally, and conference had altogether: It was resolved by all, That if one be indicted for recusancy, the Court may proceed by process upon the Statute of 23 Eliz. or by Proclamation according to the Statute of 28 Eliz. And that the process upon the Indictment for Recusancy, and Ven. fac. Capias, &c. which is the process in Indictment of Trespass; and upon the Cap. the Sheriff upon request first made to open the Door, according to the resolution in Seyman's Case, and when the Sheriff brought him into Court, he may upon refusal of taking his Oath be generally indicted as before Justices of Assize, or in open Session of the Peace upon refusal before them: But the Justices upon the second day of conference, did not speak to the other point. And after this resolution was reported to the Lords of the privy Council at Whitehall, in the presence of all the Justices of England, the seventh day of Feb. in Termin. sancti Hill. 9 Regis, and the Lord Chancellor desired that we should put our resolutions in writing; To which I answered, that the Judges never used to put their resolutions in writing, but that if the Attorney or Solicitor come to us (as the ancient use hath been to our Predecessors) we will deliver our opinions to them again Ore tenus, but not in writing.

At the third day of the conference in this very Term, it seemed upon the Statute 3 Jac. if Justices of Peace upon refusal before them, commit any person to Goal without Bail or Mainprize, and mention in their Warrant the tender and refusal, then the Justices of Assizes, or Justices of Peace ought to tender the Oath again, and to have a special Indictment; for the words of the Act 3 Jac. are, And if the said person or persons, or any other whatsoever, &c. so that this word [other] excludes the persons, who were committed for refusal. But it seems if the Mittimus of the Justices of Peace, &c. do not comprehend any tender and refusal of the Oath, then they may be generally indicted, as upon refusal in open Court, for the Court cannot take notice of tender and refusal in such case: And it was resolved, that the Major number of the Justices of Peace who commit the parties, have election to commit either to the next Assizes, or the next Sessions; for the words of the Statute being in the Disjunctive

junctive, some may be more apt to be committed until the next Assizes, and some until the next Sessions: And it is to be observed, that two Justices, of which the one is to be of the Quorum, by the Statute 7 Jac. may commit any person above the age of eighteen, and under the degree of Nobility, although that he be not indicted, nor convict, &c. But a Justice of Peace cannot commit any unless they be prosecuted, indicted, or convicted, &c. according to the Statute 7 Jac. And it was resolved by all, That if the Indictment be commenced upon the Statute 3 Jac. upon refusal in open Court, the Indictment may be short and general, of what the parties are indicted, &c. And not so if the Indictment be upon the Commitment made by two Justices of Peace; this is good of any person whatsoever, but in such case if the Mittimus be especial, comprehending the tender of the Oath and Refusal, there ought to be a special Indictment and refusal in open Court. Also if the Justice of Peace make a special Mittimus, then the Indictment ought to be special, scil. to recite that the party was indicted or presented, &c. in certain, according to the Statute of 7 Jac. And that he refused before one Justice of Peace, or otherwise in open Court; but if the Mittimus be general, as is aforesaid, then the Indictment before Justices of Assize at the Assizes, or Justices of Peace at the Sessions of Peace, may be general upon the Statute of 3 Jac.

Mich. 10. Jacobi Regis.

The Earl of Northampton's Case.

THe Attorney-general informed against Thomas Gooderick Gent. Sir Richard Cox Knight, Henry Vernon Gent. Henry Minors Serjeant of the Waggons, Thomas Lake Gent. and James Ingrum Merchant, Ore tenus in the Star-Chamber, the last day of the Star-Chamber, and charged Gooderick that he had spoken and published of the Earl of Northampton, one of the Grandees and Peers of the Realm, one of the Kings priby Council, Lord priby Seal, and Lord Guardian of the Cinque-ports, divers false and horrible Scandals, scil. That more Jesuites, Papists, &c. have come into England, since the Earl of Northampton was Guardian of the Cinque-ports than before.

2. That the said Earl had writ a Book openly against Garnet, &c. but secretly he had writ a Letter to Bellarmine, intimating that he writ the said Book Ad placandum Regem, sive ad faciendum populum, and requested that his Book might not be answered; and that the Archbishop of Canterbury had certified it to the King, and that the said Gooderick did relate it to one Dewsbury, a Batchelor in Divinity, who had acquainted the said Earl with it. Gooderick being examined, confessed the words spoken; but to extenuate his offence said, that he was not the first Founder: And he vouched the said Sir Richard Cox, who confessed that he related to Gooderick the matter concerning the book of the Earl, and his Letter to Bellarmine, but not the words concerning the Cinque-ports: And that the Archbishop of Canterbury had informed the King of it, to the intent that the Earl of Northampton should not be Lord Treasurer; and to extenuate

ate his Offence, he vouched the said Vernon, who upon examination confessed that which Richard Cox had published, but that he was not the first Author, but he cited the said Lake, who did likewise confess what Vernon had said, but that he heard it from Serjeant Nichols, who being examined confessed it. And withal, that one Speaker related it to him, and that he had heard it from one James Ingrum, and James Ingrum being examined confessed the words concerning the said book of the Earl, and of the Letter to Bellarmine: And that in the month of October, he heard the said words of two English Fugitives at Ligorne, and never did publish them until the death of the Earl of Salisbury, Treasurer, who died in May last: And all the said Defendants confessed at the Bar, all that with which they were charged. And at the hearing of this Case were eleven Judges of Law, Fleming Justice being absent Propter ægritudinem.

And so it was resolved, that the publishing of false rumors, either concerning the King, or of the high Grandees of the Realm, was in some cases punishable by the Common Law: but of this were divers opinions.

1. Touching the matter and quality of the words.
2. Touching the persons of whom they are spoke.
3. The manner of contrivance, or publishing of them.
4. Touching the punishment, for which cause divers Acts have made declaration, and have put things in certainty.

And first of all, as to the words or rumors themselves.

1. They ought to be false and horrible.

2. Of which, discord or slander may arise betwixt the King and his people, or the Grandees of the Realm, West.2. cap.24. or between the Lords and Commons, 2 R.2. cap. 53. by which great peril and mischief may come to all the Realm, ibidem.

The subversion and destruction of the Realm, ibidem. And for this the said Act of 2 R.2. against rumors, false and horrible Messages.

2. As to persons, they are declared to be Prelates, Dukes, Earls, Barons, and other Nobles and Grandees of the Realm, and also of the Chancellor, Treasurer, Clerk of the privy Seal, Steward of the household of our Sovereign Lord the King, Justice of the one Bench, and of the other, or of any the great Officers of the Realm, ut 2 R.2. cap.5. and the King is contained within the Act of West.1. cap.34. as appears in Dyer 5.Mar.155.

3. As to the third point it was resolved, that if one hear such false and horrible rumors either of the King, or of any of the said Grandees, it is not lawful for him to relate to others, that he hath heard J.S. to say such false and horrible words; for if it should be lawful, by this means they may be published generally, &c. And this doth appear by the said Statute, viz. That the party shall be imprisoned until he find out the party who spoke them, which proves that it was an offence, or otherwise he should not be punished for it by Fine (for this is implied) and Imprisonment.

It was also resolved, that the Offenders at the Bar, if against them the proceedings had been by Indictment upon these Statutes, no Judgment could be had against them, that they should be imprisoned until they found their Author: For, for example, Gooderick did not relate to Dewsbury that he heard from Sir Richard Cox, but he related the same words as

as of himself: And for this no Judgment can be given against him, that he shall be imprisoned until he find his Author: for this, that he ought to be indicted for the words which he himself did speak, and then, De non apparentibus & non existentibus eadem est ratio, When the Indictment is general without any relation to a certain Author, the Judgment, which allwaies ought to be given of matter apparent within the Record, cannot be that he shall be imprisoned, until he hath found his Author.

And it was resolved, that if A. say to be B. Did you not hear that C. is guilty of Treason, &c. this is tantamount to a scandalous publication: And in a private Action for slander of a common person, if J. S. publish that he hath heard J. N. say, that I. G. was a Traytor or Thief; in an Action of the Case, if the truth be such, he may justifie: But if I. S. publish,

That he hath heard generally without a certain Author, that I. G. was a Traytor or Thief, there an Action sur le Case lieth against I. S. for this, that he hath not given to the party aggrieved any cause of Action against any, but against himself who published the words, although that in truth he might hear them, for otherwise this might tend to a great slander of an Innocent, for if one who hath Læsam Phantasiam, or who is a Drunkard, or of no estimation, speak scandalous words, if it should be lawful for a man of credit to report them generally, that he hath heard scandalous words, without mentioning of his Author, that would give greater colour and probability that the words were true in respect of the credit of the Reporter, than if the Author himself should be mentioned, for the reputation and good name of every man is dear and precious to him: And a Record was vouched in Mich. 33 & 34 Ed. and in the 30 Ass. pl. 10. and in the Exchequer, Mich. 18 Ed. 1. Rot. 4.

Note, that all the Commissions of Oyer and Terminer give authority to enquire De illicitis verborum placitationibus, vide le Stat. 5 R. 2. cap. 6. & 17 R. 2. cap. 8. concerning Rumors, and in 3 Ed. 2. in the Exchequer, Henry Bray spoke of John Foxley Baron of the Exchequer: It was resolved, that the Judgment in an Indictment upon the said Statutes, when the words are spoken generally, without relation to a certain Author, is, that the Offender shall be fined and imprisoned, for this is implied and included in the said Statutes, as an incident to the Offence, although that it is not expressed. Also the party grieved may have an Action de scandalo Magnatum, and recover his dammages. Also the party grieved and the Kings Attorney, if the Offenders deny it, may exhibit a Bill in the Star-Chamber against the Offender, in which the King shall have a Fine, and the party shall be imprisoned, and the Court of Star-Chamber may inflict corporal punishment, as to stand upon the Pillory, and to have papers about his head.

And if the Offenders confess it, then to proceed Ore tenus upon their own confession; and for the publication of the said words, all the Defendants were punished by all the presence, una voce nullo contradicente by Fines and Imprisonment: And Gooderick and Ingrum were fined the most, for that Gooderick had no Author for the words concerning the Cinque Ports, nor could Ingrum find any Author for to vouch, that he heard by persons unknown at Ligorne in forraign parts; and therefore it was taken as a fiction of his own.

Trin.

Trin. 10. Jac.

Estwick's Case in Curia Wardorum.

KIng Philip and Queen Mary by their Letters Patents, De gratia speciali & ex certa scientia & mero motu, &c. granted to Aringal Wade in Fee, the Farm or Grange called Milton Grange in Com. Bedford, parcel of the possessions of the late dissolved Monastery of Wooborne, tenendum prædictam firmam sive Grangium de nobis & successoribus nostris, ut de Manerio nostro de East Greenwick in Com. Kantiæ in capite per servitium vicesimæ partis unius Feodi militis pro omnibus redditibus, servitiis, exactionibus, & demandis quibuscunque, which Grange by mean conveyance came to Christopher Eastwick, after whose death the Tenure was found verbatim, according to the words of the Patent. And the question was, if the Tenure was by a Mean, as of the said Honour, or in Capite: And their principal reason was, that the Letters Patents of the King shall be construed according to the Kings intention expressed in his Charter. And in this case of necessity some words ought to be rejected, scil. these words (in capite) and then the sense will be, Tenendum de nobis, &c. ut de Manerio nostro de East Greenwick in Com. Kantiæ per servitium vicesimæ partis unius feodi militis, &c. or these words, De Manerio nostro de East Greenwick in Com. Kantiæ, and then the sense will be, Tenendum de nobis, &c. in capite per vicesimam partem unius Feodi militis, &c. for both together cannot stand; and then the better shall be taken for the King, as in 5 Mariæ, Dyer 162. Tenure of the King, Per servitium militare, is to be intended Tenure in Capite. So Tenure de quo vel quibus & per quæ servitia ignorant. is Tenure in Capite, for the best shall be taken for the King, 15 vide H.7. 7. 14 Ed. 4. 5. & 3 H.7. 12. 9 H.7. 9. 6, per Hussey 13 H.7. 4. per Fineax. 19 H.8. title Office Brook 58 Action.

Another reason was added, that if these words, in Capite, shall be rejected, then the words ensuing, scil. per servitium vicesimæ partis unius Feodi militis, &c. shall be rejected here; and then the tenure will be by one entire Fee of a Knight, for words in the middle of a Sentence may be extracted; and as well the consequent as the precedent stand: But it was answered and resolved, that the said Grange was held of the King as of the Honour, and not in Capite. And the reason was for this, that Tenure of the King in Capite is as much as to say, Tenure in gross, or of the person of the King: And for this, that the chief and principal part of the body of the Tenure of the person of the King is said in Capite. And it appears by ancient Records, that in ancient time all Tenures in Gross, or of the person of a Subject called Tenures in Capite: as in Clause 9 H.3. member 28. Robertus filius Madock tenuit terram de Thoma Corbet in Capite: And in the same manner you shall find by many other Records, Lands to be held of Subjects in Capite, which we call Tenure of the person or in Gross, but of late time, Dicitur de Rege solummodo, terras teneri in Capite. Then it is as much as to say, Tenendum de nobis, &c. ut de Manerio nostro de East Greenwich in Grosse, ut de persona nostra, which is against the nature of a Tenure in Gross, or of the person, when the Land is expressly limitted to be holden of a Manor, &c. And for this, if the said words should be transposed, scil. Tenendum de nobis in Capite ut de Manerio nostro de East Greenwich, &c. this will not alter the Case, for when in the beginning or end, the Law is expressly limitted to be held ut de Manerio,

the

the Tenure of the perſon is abundant, or it may have this ſenſe, that the King is Caput totius Regni: And for this, inaſmuch as it is limited to hold of the King, who is chief, it may be vulgarly ſaid, that the Tenure is in chief, inaſmuch as it is of the King as of a Manor.

And as to the ſecond Objection, it was reſolved, That the abundant words ſhall be extended in Conſtruction of the Law, and not the words ſubſequent, which doth limit the Term in certainty: And with this reſolution in the principal point agrees Mich. 17, & 18 Eliz. 345. where it was found that Owen ap David was ſeized of certain Lands in Fee held of the Queen, as of the Principality of Wales in Cap. And it was held Per concilium Curiæ, no Tenure in Capite; and ſo (as it was ſaid) it was reſolved in the time of H.8. in Baron Luke's Caſe, where Lands were granted by the King to hold of him as of the Honour of Huntington, in Capite, that this was a mean Tenure, and not in Capite.

Nota, That a Tenure of any ancient Honours, as of Rawleigh, Hagent, and Peverell, are by uſage, and allowance in all ages taken for to have the effect of a Tenure in Capite, ſcil. To have all the Lands in Guard, &c. Et non valet ratio contra experimentum, vide le Stat. de Magna Charta, cap. 31. and the 11 H.7. in Rot. Parliamenti not printed, and 1 H.6. cap. 4. vide Bracton, lib. 2. fol. 87. 30 H.8. Dyer 8, 58. 29 H.8. Brook, title Livery 28, 57. 5 Ed. 3. 5.

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FINIS

CERTAIN

SELECT CASES

IN

L A W,

REPORTED:

BY

Sir *EDWARD COKE*, Knight,

LATE

Lord CHIEF JUSTICE

OF

ENGLAND

And one of His Majesties Council of STATE.

The Second Edition.

With two Exact Tables, the one of the Cases, and the other of the Principal Matters therein contained.

LONDON,
Printed by the Assigns of *R.* and *E. Atkins* Esquires,
for *H. Twyford*, *T. Basset*, and *B. Sherley*,
1677.

SELECT CASES

IN

L. A. IV.

REPORTED

IN

ENGLAND

TO THE READER.

READER,

IT may seem altogether an unnecessary work to say any thing in the praise and vindication of that Person and his Labours, which have had no less than the generall approbation of a whole Nation convened in Parliament: For if King THEODORICK in *Cassiodore* could affirm, *Neque enim dignus est à quopiam redargui qui nostro judicio meretur absolvi*, That no man ought to be reproved whom his Prince commends; How much rather then should men forbear to censure those and their Works which have had the greatest allowance and attestation a Senate could give, and to acquiesce and rest satisfied in that judgment? Such respect and allowance hath been given to the learned Works of the late Honourable and Venerable Chiefe Justice, Sir EDWARD COKE, whose Person in his life time was reverenced as an Oracle, and his Works (since his decease) cited as Authentick Authorities, even by the Reverend Judges themselves. The acceptance his Books (already extant) have found with all knowing Persons, hath given me the confidence to commend to the publick view some Remains of his, under his own hand-writing, which have not yet appeared to the World, yet (like true and genuine Eaglets) are well able to behold and bear the light: They are of the same Piece and Woofe with his former Works, and in respect of their own native worth, and the reference they bear to their Authour, cannot

be too highly valued : Though, in reſpect of their quantity and number, the Reports are but few ; yet, as the skilfull Jeweller will not loſe ſo much as the very filings of rich and precious metals ; and the very fragments were commanded to be kept where a Miracle had been wrought, *Propter miraculi claritatem & evidentiam :* So theſe ſmall parcels, being part of thoſe vaſt and immenſe labours of their Authour, great almoſt to a Miracle (if I may be allowed the compariſon :) were there no other uſe to be made of them (as there is very much, for they manifeſt and declare to the Reader many ſecret and abſtruſe points in Law, not ordinarily to be met with in other Books ſo fully and amply related) deſerve a publication, and to be preſerved in the reſpects and memories of Learned men, and eſpecially the Profeſſors of the Law ; and to that end they are now brought to light and publiſhed. If any ſhould doubt of the truth of theſe Reports of Sir EDWARD COKE, they may ſee the originall Manuſcript written with his own hand, at *Henry Twyford's* Shop in *Vine-Court Middle Temple.*

Farewell.

J. G.

MICH. AN. 6 JACOBI REGIS,

In the Common Pleas.

Willowes Case.

IN Treſpaſſe brought by Richard Stallon one of the Attorneys of the Court againſt Thomas Brayde (which began in Eaſter Term, An. 6 Jacobi Rot. 1845.) for breaking of his Houſe and Cloſe at Fenditton in the County of Cambridge; And the new Aſſignment was in an acre of Paſture: The Defendant pleads that the place where, &c. was the Land and Freehold of Thomas Willowes and Richard Willowes; and that he as Servant, &c. And the Plaintiff for Replication ſaith, that the place where, was parcell of the Mannor of Fenditton, and demiſable, &c. by Copy of Court-Roll in Fee-ſimple: And that the Lords of the Mannor granted the Tenements in which, &c. to John Stallon and his heirs, who ſurrendred them unto the ſaid Willowes, and Willowes, Lords of the ſaid Mannor, to the uſe of the Plaintiff and his heirs, who was admitted accordingly, &c. The Defendant doth rejoyn, and ſaith, That well and true it is, that the Tenements in which, &c. were parcell of the Mannor, and demiſable, &c. And the ſurrender and admittance ſuch, prout, &c. But the ſaid Thomas Brayde further ſaith, that the Tenements in which, &c. at the time of the Admiſſion of the ſaid Richard Stallon, were, and yet are of the clear yearly value of fifty three ſhillings and four pence; And that within the ſaid Mannor there is ſuch a Cuſtome, Quod rationabilis denariorum ſumma legalis monetæ Angliæ ſuper quamlibet admiſſionem cujuſlibet perſonæ, ſive quarumcunque perſonarum tenent. vel tenent. per Dom. vel Dominos manerii prædict. ſive per Seneſchallum, &c. ad aliquas terras ſive Tenementa Cuſtomaria Manerii prædict. ſecundum Conſuetudinem Manerii illius debetur & à tempore quo, &c. debitum fuit Dom. &c. tempore ejuſdem admiſſionis pro fine pro admiſſione illa, quod idem Dominus, vel iidem Dom. prædict. vel Seneſchallus ſuus Curiæ ejuſdem Manerii pro tempore exiſten. uſus fuit, vel uſi fuerunt per totum Tempus ſupradict. in plena Curia Manerii illius pro Admiſſione ejuſdem perſonæ, ſeu earundum perſonarum ſic facta, aſſidere & appunctuare, Anglice, to Aſſeſſe and appoint eandem rationabilem denariorum ſummam pro fine pro eadem Admiſſione ſic ut præfertur facta, nec non ſuperinde eandem denariorum ſummam ſic aſſeſſam & appunctuatam, præfatæ perſonæ ſive perſonis ſic admiſſæ ſive admiſſis, ſolveret & ſolverent, &c. eidem Domino, &c. prædictam rationabilem denariorum ſummam pro fine, pro Admiſſione ſua prædict. ſic aſſeſſam & appunctuat. And further ſaith, That the Steward of the ſaid Mannor, at a Court holden 1. Octob. in the fourth year of the Reign of the King that now is, admitted the Plaintiff to the Tenements, in which, &c. and aſſeſſed and ſet a reaſonable ſumm of money, that is to ſay, five pounds, ſix ſhillings, eight pence, that is to ſay, Valorem eorundem tenementorum per duos annos, & non ultra pro fine pro præ-

Copyhold Fine reaſonable.

dict. Admissione prædict. Richard. Stallon to the said Lords of the Mannor to be paid: And also the said Steward at the same Court did give notice and signifie to the Plaintiff the said summ was to be paid to the said Lords of the Mannor, &c. And further saith, that the said Willowes and Willowes, afterwards, that is to say, the second day of November, in the fourth year aforesaid, at Fenditton aforesaid, requested the said Richard Stallon to pay to them five pounds, six shillings, eight pence there, for the Fine for his admittance, &c. which the said Rich. Stallon then and there utterly denied and refused, and as yet doth refuse. By which the said Richard Stallon forfeited to the aforesaid Thomas and Richard Willowes all his Right, Estate, &c. of and in the Tenements aforesaid in which, &c. The Plaintiff surjoyneth, and saith, that the said summ of five pounds, six shillings, eight pence, &c. was not rationabilis finis, as the said Thomas Brayde above hath alledged, &c. upon which the Defendant doth demur in Law. And in this Case these points were resolved by Coke chief Justice, Walmsely, Warberton, Daniel, and Foster Justices, 1. And principally, if the Fine assessed had been reasonable, yet the Lords ought to have set a certain time and place when the same should be paid, because the same stands upon a point of forfeiture: As if a man bargains and assures Land to one and his heirs, upon condition that if he pay to the Bargainee or his heirs ten pounds at such a place, that he and his heirs shall re-enter: In that case because no time is limited, the Bargainor ought to give notice to the Bargainee, &c. when he will tender the money, and he cannot tender it when he pleaseth, and with that agree, 19 Eliz. Dyer 354. For a man shall not lose his Land, unless an expresse default be in him; and the Bargainee in such Case is not tied to stay alwaies in the place, &c. So in the Case at Bar, the Copyholder is not tied to carry his Fine alwaies with him, when he is at Church, or at Plow, &c. And although that the Rejoynder is, that the Plaintiff refused to pay the Fine, so he might well do, when the request is not lawfull nor reasonable, for in all cases when the request is not lawfull nor reasonable, the party may without prejudice deny the payment. And he who is to pay a great Fine, as a 100 l. or more, it is not reasonable that he carry it alwaies with him in his Pocket, and presently the Copyholder was not bound to it, because that the Fine was uncertain & arbitrable, as it was resolved in Hubbards Case in the fourth part of my Reports, amongst the Copyhold Cases. 2. It was resolved, that although the Fine be incertain and arbitrable, yet it ought to be secundum arbitrium boni viri: And it ought to be reasonable and not excessive, for all excessiveness is abhorred in Law, Excessus in re qualibet jure reprobatur Communi; For the Common Law forbids any excessive distresse, as it appeareth in 41 E.3.26. Where a man avowed the taking of sixty Sheep for 3 d. Rent, and the Plaintiff prayed that he might be amerced for the Distresse: And the Court (who is alwaies the Judge whether the Distresse be reasonable or excessive) held, that six Sheep had been a sufficient Distresse for the said Rent, and therefore he was amerced for so many of them as were above six Sheep: And the Court said that if the Avowant shall have return, he shall have a return but of six Sheep: and this appeareth to be the Common Law; for the Statute of Articuli super Chartas extends only where a grievous Distress is taken for the Kings Debt. See F.N.B.174.a. and 27.Ass.51. 28. Ass. 50. 11 H.4.2. and 8 H.4.16,&c. Non Capiatur gravis districtio,&c. And so if an excessive or an unreasonable Amerciament be imposed in any

Vi.F.N. B.82.a. reasonable Aid incertain untill the Statute of Glanvi. lib.9.fol.70. 14 H.4.9. by Hill. 14 H.4.1.a.

Court

Court Baron or other Court which is not of Record, the party shall have Moderata Misericordia: And the Statute of Magna Charta is but an affirmance of the Common Law in such point. See F.N.B. 75. Nullus liber homo amercietur nisi secundum quantitatem delicti. And gravis Redemptio non est exigenda. And the Common Law gives an Assise of Sobient Distresse, and Multiplication of Distresse found, which is excessive, in respect of the multiplicity of vexation. And therewith agreeth 27. Ass. 50,51. Non Capiatur multiplex districtio, F.N.B.178.b. And if Tenant in Dower hath Villains, or Tenants at Will who were rich, and she by excessive Tallages and Fines makes them poor and Beggers, the same is adjudged Wast. And therewith agreeth F.N.B. 61. b. 16 H. 3. Wast 135. and 16 H. 7. And see the Register Judiciall fol. 25. b. Wast lieth, in exulando Henricum, & Hermannum, &c. Villeios, Quorum quilibet tenet unum Messuagium & unam virgat. terræ, in Villinagio in prædict' villa de T. by grievous and intolerable Distresses: By all which it appeareth, That the Common Law doth forbid intolerable and excessive oppressing and ransoming of Villains, whereby of Rich they become Poor: And yet it may be said, that a man may do with his Villain what he pleaseth, or with his Tenant at will; but the Law limits the same in a reasonable and convenient manner; For it appeareth, that such intolerable oppression of the poor Tenants is to the disinheritzon of him in the Reversion. So in the Case at Bar, Although that the Fine is incertain, yet it ought to be reasonable, and so it appeareth by the said Custome which the Defendant hath alledged. And therefore in such Case, the Lord cannot take as much as he pleaseth, but the Fine ought to be reasonable according to the Resolve of the Court in the said Case of Hubbard in the fourth part of my Reports 30. It was resolved, That if the Lord and Tenant cannot agree of the Fine, but the Lord demandeth more than a reasonable Fine, that the same shall be decided and adjudged by the Court, in which any Suit shall be for, or by reason of the denying of the Fine, And the Court shall adjudge what shall be said a reasonable Fine, having regard to the quality and value of the Land, and other necessary circumstances which ought to appear in pleading upon a Demurrer, or found by Verdict: And if the Fine which the Lord or his Steward asseseth be reasonable, Let the Copyholder well advise himself before he deny the payment of it: And always when reasonableness is in question, the same shall be determined by the Court in which the Action dependeth: As reasonable time, 21 H. 6. 30. 22 E. 4. 27. & 50. 29 H. 8. 32. &c. So if the Distresse be reasonable, and the like, &c.

It was resolved, That the said Fine in the Case at the Bar was unreasonable, viz. To demand for a Cottage and an acre of Pasture, five pounds, six shillings, eight pence, for the Admittance of a Copyholder in Fee-simple upon a Surrender made; For this is not like to a voluntary Grant, as when the Copyholder hath but an Estate for life, and dieth, Or if he hath an Estate in Fee-simple, and committeth Felony, there Arbitrio Dom. res æstimari debet; but when the Lord is compellable to admit him to whose use the Surrender is, And when Cestui que use is admitted, he shall be in by him who made the Surrender, and the Lord is but an Instrument to present the same: And therefore in such Case, the value of two years for such an Admittance is unreasonable, especially when the value of the Cottage and one acre of Pasture is a Mark, at fifty three shillings by the year.

5. It was resolved, That the Surjoynder is no more than what the Law

See Glanvil lib. 9. cap. 8. Oprime, B. rationabilibus auxiliis, ita ramen moderat. secund. Quantitatem feodorum suorum & secundum facultates ut nemini gravidæ viderentur, &c. Vide Bracton. 84. b. rationab. relev. 1. quod rationem & mensuram non excedat. and see him there 86. oprime, &c.

Vide 14 H. 4. 4. by Hil.

Bracton l. 2. fol. 51. Quam longum debet esse tempus non definitur in jure, sed pendet ex juditiariorum discretione.

Law ſaith, For in this Caſe in the Judgment of the Law, the Fine is unreaſonable; and therefore the ſame is but ex abundanti: and now the Court ought to Judge upon the whole ſpecial matter; And for the Cauſes aforeſaid, Judgment was given for the Plaintiff.

And Coke chief Juſtice ſaid in this Caſe, That where the uſage of the Court of Admiralty is to amerce the Defendant for his default by his diſcretion, as it appeareth in 19 H.6.7. That if the Amerciament be outrageous and exceſſive, the ſame ſhall not bind the party, and if it be exceſſive or not, it ſhall be determined in the Court in which the Action ſhall be brought, for the levying of it: And the Writ of Account is againſt the Bayliff, or Guardian, Quod reddat ei rationabilem Computum de exitibus Manerii. And the Law requireth a thing which is reaſonable, and no exceſs or extremity in any thing.

II. Mich. 6 Jacobi, in the Common Pleas.

Porter and Rocheſters Caſe.

The Statute of 23 H. 8. of citing out of Dioceſes.

THis Term Lewis and Rocheſter who dwelt in Eſſex within the Dioceſe of London, were ſued for ſubſtraction of Tithes growing in B. within the County of Eſſex, by Porter, in the Court of the Arches of the Biſhop of Canterbury in London. And the Caſe was, That the Archbiſhop of Canterbury hath a peculiar Juriſdiction of fourteen Pariſhes, called a Deanry, exempted from the Authority of the Biſhop of London, whereof the Pariſh of S. Mary de Arcubus is the Chief: And the Court is called the Arches, becauſe the Court is holden there; And a great queſtion was moved, if in the ſaid Court of Arches holden in London within his Peculiar, he might cite any dwelling in Eſſex for ſubſtraction of Tithes growing in Eſſex; Or if he be prohibited by the Statute of the twenty third year of King Henry the eighth, cap.9. And after that the matter was well debated as well by Councell at the Bar, as by Dr. Ferrard, Dr. James, and others in open Court, and laſtly, by all the Juſtices of the Common Pleas, a Prohibition was granted to the Court of Arches. And in this Caſe divers Points were reſolved by the Court.

1. That all Acts of Parliament made by the King, Lords, and Commons of Parliament are parcell of the Laws of England, and therefore ſhall be expounded by the Judges of the Laws of England, and not by the Civilians and Commoniſts, although the Acts concern Eccleſiaſticall and Spiritual Juriſdiction; And therefore the Act of 2 H.4.cap.15. by which in effect it is enacted, Quod nullus teneat, doceat, informet, &c. clam, vel publice aliquam nefandam opinionem contrariam fidei Catholicæ ſeu determinationi Eccleſiæ ſacro-ſanctæ, nec de hujuſmodi ſecta, & nefandis Doctrinis Conventiculas faciat: And that in ſuch Caſes, the Dioceſan might arreſt and impriſon ſuch Defender, &c. And in 10 H.7. the Biſhop of London commanded one to be impriſoned, becauſe that the Plaintiff ſaid that he ought not to pay his Tithes to his Curat: and the party ſo impriſoned brought an Action of Falſe Impriſonment againſt thoſe who arreſted him by the commandment of the Biſhop; and there the matter is well argued, What words are within the ſaid Statute, and what without the Statute: So upon the ſame Statute it was reſolved in 5 E. 4. in Keyſars caſe in the

Kings

Kings Bench, which you may see in my Book of Precedents: And so the Statutes of Articuli Cleri, de Prohibitione regia; De Circumspecte agatis, of 2 E. 6. cap. 13. and all other Acts of Parliament concerning Spiritual Causes, have always been expounded by the Judges of the Common Law: as it was adjudged in Wood's Case, Pasch. 29 Eliz. in my Notes, fol. 22. So the Statute of 21 H. 8. cap. 13. hath been expounded by the Judges of the Realm concerning Pluralities, and the having of two Benefices: Common Laws and Dispensations, see 7 Eliz. Dyer 233. The Kings Courts shall adjudg of Dispensations and Commendams: See also 17 Eliz. Dyer 251. 14 Eliz. Dyer 312. 15 Eliz. Dyer 327. 18 Eliz. Dyer 352. and 347. 22 Eliz. Dyer 377. Construction of the Statute cap. 12. Smiths Case, concerning Subscription which is a meer Spiritual thing. Also it appeareth by 22 Eliz. Dyer 377. That for want of subscription the Church was always void by the said Act of 23 Eliz. and yet the Civilians say, that there ought to be a Sentence Declaratory, although that the Act maketh it void.

2. It was resolved by Coke chief Justice, Warberton, Daniel, and Foster Justices, That the Archbishop of Canterbury is restrained by the Act of 23 H. 8. cap. 9. to cite any one out of his own Diocese, or his Peculiar Jurisdiction, although that he holdeth his Court of Arches, within London. And first it was objected,

That the Title of the Act is; An Act that no person shall be cited out of the Diocese where he or she dwelleth, except in certain Cases: And here the Archbishop doth not cite the said Party dwelling in Essex, out of the Diocese of London, for he holdeth his Court of Arches within London.

2. The Preamble of the Act is, Where a great number of the Kings Subjects dwelling in divers Dioceses, &c. And here he doth not dwell in divers Dioceses.

3. Far out of the Diocese where such men, &c. dwell, and here he doth not dwell far out, &c.

4. The body of the Act is, No manner of person shall be cited before any Ordinance, &c. out of the Diocese or peculiar Jurisdiction where the person shall be inhabiting, &c. And here he was not cited out of the Diocese of London. To which it was answered and resolved, That the same was prohibited by the said Act for divers Causes.

1. As to all the said Objections, One answer makes an end of them all: For Diœcesis dicitur distinctio, vel divisio, sive gubernatio, quæ divisa, & diversa est ab Ecclesia alterius Episcopatus, & Commissa Gubernatio in unius; and is derived a Di. quod est duo, & electio, id est, separatio, quia separat duas Jurisdictiones: So Diocese signifies the Jurisdiction of one Ordinary separated and divided from others; And because the Archbishop of Canterbury hath a peculiar Jurisdiction in London, exempt out of the Diocese or Jurisdiction of the Ordinary or Bishop of London: For that cause it is fitly said, in the Title, Preamble, and body of the Act, That when the Archbishop sitting in his exempt Peculiar in London, cites one dwelling in Essex, he cites him out of the Diocese or Jurisdiction of the Bishop of London, ergo he is cited out of the Diocese: And in the clause of the penalty of Ten pounds, It is said, out of the Diocese, or other Jurisdiction where the party dwelleth, which agreeth with the signification of Diocese before. And as to the words, Far off, &c. they were put in the Preamble, to shew the great mischief which was before the Act: As the Statute of 32 H. 8. cap. 33. in the Preamble, it is Disseisins with strength; and the body

of the Act saith, such Disseisor, yet the same extendeth to all Disseisors, but Disseisin with force was the greatest mischief, as it is holden in 4, and 5 Eliz. Dyer 219. So the Preamble of the Statute of West. 2. cap. 5. is, Heirs in Ward, and the body of the Act is, Hujusmodi præsentat. as it is adjudged in 44 E. 3. 18. That an Infant who hath an Advowson by descent, and is out of Ward, shall be within the remedy of the said Act, but the Frauds of the Guardians was the greater mischief. So the Preamble of the Act of 21 H. 8. cap. 15. which gives falsifying of Recoveries, recites in the Preamble, That divers Lessees have paid divers great Incomes, &c. Be it enacted, That all such Termors, &c. and yet the same extends to all Termors: and yet all these Cases are stronger than the Case at Bar, for there that word (such) in the body of the Act referreth the same to the Preamble, which is not in our Case.

2. The body of the Act is, No manner of person shall be henceforth cited before any Ordinary, &c. out of the Diocese or peculiar Jurisdiction where the person shall be dwelling: And if he shall not be cited out of the Peculiar before any Ordinary, à Fortiori, the Court of Arches which sits in a Peculiar, shall not cite others out of another Diocese: And these words, Out of the Diocese, are to be meant out of the Diocese or Jurisdiction of the Ordinary, where he dwelleth; but the exempt Peculiar of the Archbishop is out of the Jurisdiction of the Bishop of London, as S. Martins, and other places in London, are not part of London, although they are within the circumference of it.

3. It is to be observed, That the Preamble reciting of the great mischief, recites expressly, That the Subjects were called by compulsary process to appear in the Arches, Audience, and other high Courts of the Archbishoprick of this Realm; So as the intention of the said Act was to reduce the Archbishop to his proper Diocese or peculiar Jurisdiction, unless it were in five Cases.

1. For any Spiritual Offence or cause committed, or omitted contrary to the right and duty by the Bishop, &c. which word (omitted) proves that there ought to be a default in the Ordinary.

2. Except it be in case of Appeal, and other lawful cause wherein the party shall find himself grieved by the Ordinary after the matter or cause there first begun; ergo the same ought to be first begun before the Ordinary.

3. In case that the Bishop of the Diocese, or other immediate Judg or Ordinary dare not, or will not convent the party to be sued before him; where the Ordinary is called the immediate Judg, as in truth he is; and the Archbishop, unless it be in his own Diocese (these special Cases excepted) mediate Judg, scil. by Appeal, &c.

4. Or in case that the Bishop of the Diocese, or the Judg of the place within whose Jurisdiction, or before whom the Suit by this Act should be begun and prosecuted, be party directly or indirectly to the matter or cause of the same suit; Which clause in express words is a full exposition of the body of the Act, scil. That every suit (others than those which are expressed) ought to be begun and prosecuted, before the Bishop of the Diocese, or other Judg of the same place.

5. In case that any Bishop, or any inferiour Judg, having under him Jurisdiction, &c. make request, or instance to the Archbishop, Bishop, or other inferiour Ordinary or Judg, and that to be done in cases only where the Law Civil or Common doth affirm, &c. By which it fully appeareth, That the Act intendeth, That every Ordinary and

Ecclesiastical

Ecclesiastical Judg should have the Conusance of Causes within their Jurisdiction, without any Concurrent Authority or Suit by way of prevention: And by this, the Subject hath great benefit as well by saving of travel and charges to have Justice in his place of habitation, as to be judged where he and the matter is best known; As also that he shall have many Appeals as his Adversary in the highest Court at the first. Also there are two Provisoes which explain it also, scil. That it shall be lawful to every Archbishop to cite any person inhabiting in any Bishops Diocese within his Province, for matter of Heresie, (which were a vain Proviso, if the Act did not extend to the Archbishop: But by that special Proviso for Heresie, it appeareth, that, for all causes not excepted, is prohibited by the Act) Then the words of the Proviso go further, If the Bishop or other Ordinary immediately hereunto consent, or if the same Bishop or other immediate Ordinary or Judg do not his duty in punishment of the same; which words immediately and immediate expound the intent of the makers of the Act.

2. There is a saving for the Archbishop, the calling any person out of the Diocese where he shall be dwelling to the probate of any Testaments; which Proviso should be also in vain, if the Archbishop notwithstanding that Act should have concurrent Authority with every Ordinary through his whole Province: Wherefore it was concluded that the Archbishop out of his Diocese, unless in the Cases excepted, is prohibited by the Act of 23 H. 8. to cite any man out of any other Diocese. And in truth the Act of 23. of Henry the Eighth, is but a Law declaratory of the ancient Canons, and of the true exposition of them: And that appeareth by the Canon, Cap. Romana in sexto de Appellationibus, and Cap. de Competenti in sexto. And the said Act is so expounded by all the Clergy of England, at a Convocation in London, An. 1 Jac. Regis 1603. Canon 94. Where it is decreed, ordained, and declared, That none should be cited to the Arches, or Audience, but the Inhabitants within the Archbishops Diocese, or Peculiar, other than in such particular Cases only as are expressly excepted and reserved in and by a Statute, Anno 23 H. 8. cap. 9. And the King by Letters Patents under the great Seal hath given his Royal Assent to this amongst others from time to time to be observed, fulfilled, and kept, as well by the Archbishop of Canterbury, the Bishops and their Successors, and the rest of the whole Clergy of the Province of Canterbury, in their several Callings, Offices, Functions, Ministeries, Degrees, and Administrations; as also by all and every Dean of the Arches, and other Judg of the said Archbishops Courts, Guardians of Spiritualties, Chancellors, &c. So the same is also expressly confirmed under the great Seal. And although the Archbishoprick of Canterbury was then void, yet the Guardian of the Spiritualties was there, and the Archbishop of Canterbury that now is, and then Bishop of London, was by Letters Patents, President of the said Council in the place of the Archbishop then deceased: And the King gave his Royal Assent to the same, and the said Canon is of as full force as if the said late Archbishop of Canterbury had been then alive. And whereas it is said in the Preamble of the Act, In the Arches, Audience, and other high Courts of the Archbishop of this Realm; It is to be known, That the Archbishops of this Realm before that Act had power Legatine from the Pope, by which they pretended to have not only superemnent Authority over all, but concurrent Authority with every Ordinary in his Diocese, not as Archbishop of Canterbury, &c. but by his power and

The Act of 23 H. 8. is a Declaration of the old Canon Law.

Canon 1 Jac. at the Synod at *London*. Vi. *Linwood de excusationibus*, 200. Lit. m. 5. & pag. 2. L. a.

Archbishops were *Legati nati*, and had Legatine power, which is now abolished, vi. *Linwood*.

authority Legatine: For Sunt tria genera Legatorum. 1. Quidam de latere Dom. Papæ mittuntur, ut Cardinales quos appellant fratres. 2. Alii ſunt Dativi, & non de latere, qui ſimpliciter in Legatione mittantur, &c. 3. Sunt Nati, ſive Nativi, qui ſuarum Eccleſiarum prætextu legatione fingantur, & Tales ſunt quatuor, ſcil. Archiepiſcopus Cant. Eboracenſis, Remanenſis, & Piſanis. So as before that Act, the Archbiſhop of Canterbury, was Legatus Natus, and by force of his authority Legatine uſurped againſt the Canons upon all the Ordinaries in his Precinct, and by colour thereof claimed currant authority with them, which although they held in the Courts of the Archbiſhop, the ſame was remedied by the Act of 23 H. 8. cap. 9. and all that which he uſurped before, was not as he was Archbiſhop, for as to that he was reſtrained by the Canons, but as he was Legatus Natus, which authority is now taken away and aboliſhed utterly.

Vi. lib. Arch. Cant. p. 39. that the Archbiſhop of Cant. hath a Peculiar in many Dioceſes.

Laſtly, If the ſaid Act of 23 H. 8. cap. 9. ſhould not be ſo expounded, Then the Act which is principally made (as it appeareth by the Preamble againſt the Courts of the Archbiſhoprieks) ſhould be as to them illuſory; For if the Biſhop of Canterbury, in reſpect of his exempt Peculiar in London, may draw to him all the Dioceſe in London; ſo might he at Newington which is a Peculiar in Wincheſter Dioceſs, draw to him the whole Dioceſe of Wincheſter; and at Totteredge near Bornet, the whole Dioceſe of Lincoln, and ſo of the like.

3. It was reſolved, That when any Judges are prohibited by any Act of Parliament, that if they do proceed againſt the Act, there a Prohibition lieth. As againſt the Steward and Marſhall of the Houſhold. Quod Seneſchallus & Mariſcallus non teneant Placit. de libero tenem. de Debito, de Conventione, &c. So the Statute of Articuli ſuper chartas, cap. 3. Regiſter fol. 185. inter Brevia ſuper ſtatuta. So againſt the Conſtable of the Caſtle of Dover: Quod non tangit Cuſtodiam Caſtri. So to Juſtices of Aſſiſe upon the Statute Quod Inquiſitiones quæ ſunt magnæ exactionis non capiantur in Patria.

Vi. Paſc. 42 Eliz. Rot. 139. *Rudd's* Caſe, a Prohibition for citing out of the Dioceſe.

Alſo to the Treaſurer and Barons of the Exchequer, upon the ſtatute De Articul. ſuper Cartas, cap. 4. The ſtatute of Rutland, cap. ultimo. Quod communia Placit. non teneantur in Scaccario. All which, and many more, you may ſee in the Regiſter inter Brevia ſuper Statuta. See F. N. B. 45, & 46, &c. 17 H. 6. 54. vi. 13 E 3. to Prohibition: A Prohibition to the Chancellor, and diverſity of Courts in the Title of Chancery. So againſt all Eccleſiaſtical Judges upon the ſtatute of 2 H. 5. cap. 3. If the Judges there will not give or deliver to the party a Copy of the Libel, although that the matter be meer Eccleſiaſtical: and therewith agreeth 4 E. 4. 37. and F. N. B. 43. e. So the Caſe upon the Statute of 2 H 5. cap. 15. If the Eccleſiaſtical Judges in caſe of Hereſie, and other matters of meer Spirituality do not proceed according to the intention of the ſame Statute; as it appeareth by the Precedent in 5 E. 4. Keyſons Caſe, 10 H. 7. 17. See the opinion of Paſton, 9 H. 6. 3. A man excommunicated by the Biſhop of London, for a Crime done in another Dioceſe, ſhall not be grieved thereby; ſo as the Common Law takes notice of the Canons, in ſuch caſe, as Coram non Judice. And although the Statute of 23 H. 8. inflicts a penalty, yet a Prohibition lyeth, for the inflicting of the penalty doth not take away the Prohibition of the Law: and therefore, Cap. which inflicts puniſhment if the Sheriff doth not put his Fame unto the Return; yet the ſame is Error if he doth not put to his Fame: See 35 H. 6. 6. when any thing is prohibited by a Statute, if the party be convicted, he ſhall be fined for

Vi. If any one in the Spiritual Court appeals contrary to the Statute of 24 H. 8. cap. 12. although the matter be meer Spiritual, a Prohibition lieth. So upon the Statute of 2 H. 5. cap. 2.

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the contempt to the Law: and 19 H.6.4. agrees in Maintenance: And if every person should be put to his Action upon the Statute, the same should be cause of Suits and vexation; and the shortest and most easy is to have a Prohibition: See the Statute of 21 H.8. cap.6. of Mortuaries, by which it is enacted, That no Parson, Vicar, Curat, &c. demand any Mortuary but in such manner as is mentioned in the Act, upon pain of forfeiture of so much in value as they take, more than is limited by the Act, and forty shillings over to the party grieved. Yet it appeareth by Doctor and Student lib.2. cap.55. fol. 105. That if the Parson, &c. sueth for Mortuaries otherwise than the Act appointeth, that a Prohibition lyeth; yet there is a Penalty added, which is an authority expresly in the Point: And the Case at Bar is a more strong Case, and that for three reasons.

1. It was made an affirmance of the Canon Law.

2. It was made for the ease of the People and Subjects, and for the maintenance of the Jurisdiction of the Ordinary, so as the Subjects have benefit by the Act; and therefore although that the King may dispence with the penalty, yet the Subject grieved shall have a Prohibition. And the Rule of the Court was, Fiat Prohibitio Curiæ Cantuar. de Arcub. inter partes predict' per Curiam. And Sherley, and Harris Junior, Serjeants at Law, were of Councell in the Case.

See 2 H. 4. 10. by Hankford, and so affirmed by the Court, when one who hath not authority, holdeth plea in spiritual things, whereof the Jurisdiction doth not belong to him, yet no consultation shall be granted, because a consultation shall not be granted to one that hath not power, &c.

III. Mich. 6 Jacobi Regis. Edwards Case.

THe high Commissioners in Causes Ecclesiasticall objected divers Articles in English, against Thomas Edwards dwelling in the City of Exeter. High Commission.

1. That Mr. John Walton hath been many years trained up in Learning in the University of Oxford, and there worthily admitted to severall degrees of Schools, and deservedly took upon him the degree of Doctor of Physick.

2. That he was a Reverend, and well practised man in the Art of Physick.

3. That you the said Thomas Edwards are no Graduate.

4. That you knowing the Premisses, notwithstanding you the said Edwards, &c. of purpose to disgrace the said Dr. Walton, and to blemish his Reputation, Learning and Skill, with infamy and reproach, did against the Rules of charity write and send to the said Mr. Doctor Walton, a lewd and ungodly, and uncharitable Letter, and therein taxed him of want of Civility and Honesty, and want of Skill and Judgment in his Art and Profession, &c. And you so far exceeded in your immoderate and unevil Letter, that you told him therein in plain termes, He may be crowned for an Asse, as if he had no manner of skill in his Profession, and were altogether unworthily admitted to the said Degrees, and therein you purposely and advisedly taxed the whole University of rashness and indiscretion for admitting him to that Degree without sufficiency and desert.

5. And further to disgrace the said Mr. Doctor Walton, in the said University, did publish a Copy of the said Letter to Sir William Courtney and others, and in your Letter was contained, Sipsilam licheneu mentegram, Take that for your inheritance, and thank God you had a good Father: And did not you thereby co-

verily mean, and imply, That the Father of the said Dr. Walton (being late Bishop of Exeter, and a Reverend Prelate of this Land) was subject to the Diseases of the French Pox and Leprosie, to the dislike of the Dignity and Calling of Bishops.

6. That in another Letter you sent to Mr. Dr. Maders Doctor of Physick, you named Mr. Doctor Walton, and made a Poyn in your Letter: And we require you upon your Oath to set down, whether you meant not that they were both Cuckolds, and what other meaning you had.

7. You knowing that Dr. Walton was one of the high Commission in the Diocese of Exeter, and having obtained a Sentence against him in the Star-Chamber, for contriving and publishing of a Libell, did triumphingly say, That you had gotten on the hipp a Commissioner for Causes Ecclesiasticall in the Diocese of Exeter, which you did to vilifie and disgrace him, and in him the whole Commission Ecclesiasticall in those parts.

Lastly, that after the Letter missive sent unto you, you said arrogantly, That you cared not for any thing that this Court can do unto you, nor for their censure, for that you can remove this matter at your pleasure.

And this Term it was moved to have a Prohibition in this Case. And the matter was well argued; And at last it was resolved by Coke chief Justice, Warberton, Daniel, and Foster Justices, That the first six Articles were mer Temporall concerning Doctor Walton in his Profession of Physick, and so touched the Temporall person, and a temporall matter, and in truth, it is in the nature of an Action upon the Case for Scandall in his Profession of Physick: And yet the Commissioners themselves do proceed in the same Ex Officio. And it was resolved, that as for them, a Prohibition doth lye for divers causes.

See Book of Entries 444. & 447. Non est Juri consentaneum quod quis super iis quorum cognitio ad nos pertinet in Curia Christianitatis trahatur in placita. vi. Stat. Circumspecte agatis, An. 13 E. 1. Episcopus teneat placita in Curia Christianitatis de his quæ sunt mere Spiritualia. Et vi. Lindwood f. 70. Lit. m. dicuntur mere Spiritualia quia non habent mixturam Temporalem. vi. 22 E. 4. l. Consulrat. vi. 22 E. 4. the Abbot of Sions case.

1. Because that the matter and persons are Temporal.

2. Secondly, Because it is for Defamation, which if any such shall be for the same, it ought to begin before the Ordinary, because it is not such an Enormous Offence, which is to be determined by the high Commissioners: And for the same reason Suit doth not lye before them, for calling the Doctor Cuckold, as it was objected in the seventh Article: And it was said, that the high Commissioners ought to incur the danger of Præmunire.

2. It was resolved, That the Ecclesiastical Judge cannot examine any man upon his Oath, upon the intention and thought of his Heart, for Cogitationis pœnam nemo emoret. And in cases where a man is to be examined upon his Oath, he ought to be examined upon Acts or words, and not of the intention and thought of his heart; and if every man should be examined upon his Oath, what opinion he holdeth concerning any point of Religion, he is not bound to answer the same, for in time of danger, Quis modo tutus erit, if every one should be examined of his thoughts. And so long as a man doth not offend neither in act nor in word any Law established, there is no reason that he should be examined upon his thought or Cogitation: For as it hath been said in the Proverb, Thought is free; And therefore for the sixth and seventh Articles, they were resolved as well for the matter as for the form in offering to examine the Defendant upon his Oath, of his intention and meaning, to be such, to which the Defendant was not to be compelled to answer: Ergo, it was resolved, that as to the Article, he might justifie the same, because as it appeareth upon his own shewing, that

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the Doctor was sentenced in the Star-chamber: Also the Libell is matter mer Temporall, and if it were mer Spirituall such a Defamation is not examinable before the high Commissioners.

As to the last Article, It appeareth now by the Judgment of this Court, that he might well Justifie the said words: Also the high Commissioners shall not have Conusance of any Scandall to themselves for that they are parties; and such Scandall is punishable by the Common Law, as it was resolved in Hales Case, which see in the Book of the Lord Dyers Reports, and see in my Book of Precedents, the Copy of the Indictment of Hales, for scandalling of the Ecclesiasticall Commissioners. Judex non potest injuriam sibi datam punire. Vi. the Stat. of 23 H. 8. c. 9.

Note, the Bishop of Winchester being Visiter of the School of Winchester of the Foundation of Wickham Bishop of Winchester; and the Bishop of Cant. and other his Colleagues, An. 5 Car. cited the Usher of the said School, by force of the said Commission to appear before them and proceed there against him, for which they incurred the danger of a Premunire. And so did the Bishop of Canterbury and his Colleagues, by force of a high Commission to them directed, cite one Humphrey Frank Master of Arts and Schoolmaster of the School of Sevenock, (of the Foundation of Sir William Sevenock, in the time of King Henry the sixth) to appear before the high Commissioners at Lambeth the sixth day of December last past, which citation was subscribed by Sir John Bennet Doctor of Law, Doctor James, and Doctor Hickman, three of the high Commissioners: and Sir Christopher Perkins procured the said Citation to be made, and when the said Frank appeared, the Archbishop being associated with Sir Christopher Perkins, and Doctor Abbot Dean of Winchester, made an Order concerning the said School (scil.) That the said Frank shall continue in the same School untill the Annunciation, and that he should have twenty pounds paid to him by Sir Ralph Bosoile Knight.

IV. Mich. 6 Jacobi Regis.

Taylor and Shoiles Case.

TAylor informed upon the Statute 5 Eliz. cap. 4. Tam pro Domino Reg. quam pro seipso in the Exchequer, That the Defendant had exercised the Art and Mystery of a Brewer, &c. and averred that Shoile the Defendant did not use or exercise the Art or Mystery of a Brewer, at the time of the making of the Act, nor had been Apprentice by seven years at least, according to the said Act, &c. The Defendant did demur in Law upon the Information, and Judgment was given against him by the Barons of the Exchequer. And now in this Term upon a Writ of Error, the matter was argued at Serjeants-Inne, before the two chief Justices, and two matters were moved; The One, That a Brewer is not within the said Branch of the said Act: For the words are, That it shall not be lawfull to any person or persons, other than such as now lawfully use or exercise any Art, Mystery, or manuall Occupation, to set up, use or exercise any Art, Mystery, or manuall Occupation, except he shall have been brought up therein seven years at the least, as an Apprentice. And it was said, That the Trade of a Brewer is not any Art, Mystery, or manual Occupation within the said Branch, because the same is easily and presently learned, and he needs

needs not to have seven years Apprentiship to be instructed in the same, for every Huswife in the Country can do the same: and the Act of Henry the eighth is, That a Brewer is not a Handycraft Artificer.

2. It was moved, That the said Averment was not sufficient, for the Averment ought to be as generall as the exception in the Statute is (scil.) That the Defendant did not use any Art, Mystery, or Occupation at the time of the making of the same Act, for by this pretence if any Art, &c. then as a Taylor, Carpenter, &c. he may now exercise any other Art whatsoever.

As unto the first, It was resolved, That the Trade of a Brewer (scil.) to hold a Common Brewhouse, to sell Beer or Ale to another, is an Art or Mystery within the said Act; for in the beginning of the Act, It is enacted, That no person shall be retained for lesse time than a whole year in any of the Services, Crafts, Mysteries, or Arts of Cloathing, &c. Bakers, Brewers, &c. Cooks, &c. So as by the judgment of the same Parliament, The Trade of a Brewer is an Art and Mystery; which words are in the said Branch upon which the said Information is grounded. Also because that every Huswife brews for her private use; so also she bakes, and dresseth Meat: And yet none can hold a common Bakehouse, or a Cooks Shop to sell to others, unlesse that he hath been an Apprentice, &c. for they are expressly named also in the Act as Arts and Mysteries: And the Act of 22 H. 8. cap. 13. is explained, That a Brewer, Baker, Surgeon, and Scrivener Alien, are not handycrafts mentioned within certain penall Lawes: But the same doth not prove, but that they are Arts or Mysteries, for Art or Mystery is more generall than Handycrafts, for the same is restrained to Manufactures.

As to the second Point, It was resolved, That the intention of the Act was, That none should take upon him any Art, but he who hath skill or knowledge in the same: And therefore the Statute intendeth, That he who useth any Art or Mystery at the time of the Act, might use the same Art or Mystery; for Quod quisque norit in hoc se exerceat: And the words of the Act are, As now do lawfully use, &c. And it was said, That it was very necessary, that Brewers should have knowledge and skill in Brewing good and wholsome Beer and Ale, for that the same doth greatly conduce to mens healths: And so the first Judgment was affirmed.

V. Mich. 6 Jacobi, In the Common Pleas.

The Case of Modus Decimandi.

Tithes.

SHerley Serjeant moved to have a Prohibition, because that a person sued to have Tithes of Silva Cedua under twenty years growth in the Weild of Kent; where, by the Custome of it which is a great part of the County, Tithes of any Wood was never paid. And if such a Custome in non Decimando for all Lay-people within the said Weild, were lawfull or not was the question; and to have a Prohibition it was said, That although one particular man shall not prescribe in non decimando, yet such a general Custome within a great Country might well be, as in 43 E. 3. 32. and 45 E. 3. Custome 15. It was presented in the Kings Bench, That an Abbot had purchased Tenements after the Statute, &c. And the Abbot came and said, That he was Lord of the Town

Town, &c. And the custom of the Town was, That when the Tenant ceaseth for two years, that the Lord might enter until agreement be made for the Arrerages; And that he who held these Tenements was his Tenant, and ceased for two years, and he entred: and the Rule of the Court is, Because it was an usage only in that Town, and not in the Towns, that is, in the Country adjoyning, he was put to answer. So as by the same it appeareth, that a Custom was not good in a particular Town, which perhaps might be good and of force in a Country, &c. See 40 Ass. 21. and 27. 39 E. 3. 2. A Custom within a Town, that an Infant, &c. might alien, is not good; But yet such a Custom within Kent hath oftentimes been adjudged to be good. See 7 H. 6. 26. b. 16 E. 2. Prescription 53. Dyer 363. 22 H. 6. 14. 21 E. 4. 15. and 45 Ass. 8. See Doctor and Student, lib. 2. cap. 55. A particular Country may prescribe to pay no Tithes for Corn, Hay, and other things, but that is with this caution, so as the Minister hath sufficient portion besides to maintain him, to celebrate the Divine Service: And fol. 172. it is holden, That where Tithes have not been paid of Under-woods under twenty years growth, that no Tithes shall be paid for the same, because that they do not renew nor increase from year to year, so as they are not due to the Parson but by Custom. And he saith fol. 174. That such a Custom of a whole Country, that no Tithes of a Lordship shall be paid, is good; and it is to be observed, that in all Libels for Tithes of Woods, they alledg a prescription to have Tithes of them: But the Court would advise, whether such a Custom for a Town or a Country should be good; But in ancient times, The Parishioners have given or procured to the Parson a Wood or other Lands, &c. to have and to hold to him and his Successors in satisfaction of all Tithes of Wood in the same Parish, and the Parson is now seised of the same Wood, and that without question is a good discharge of his Tithes; and that in such case, if he sueth for Tithes of Wood a Prohibition lieth: And therefore it hath been said now of late, That such opinions were new and without any antiquity, unto the great prejudice of the Church: I will cite you an ancient Judgment many years past, Mich. 25 H. 3. Wilts. Rot. 5. before the King at Westminster, Samson Foliet brought an Attaint upon a Prohibition, against Thomas Parson of Swynden, because he sued him in the Spiritual Court for a Lay Fee of the said Sampson, in Draycot, contrary to the Kings Prohibition, &c. The Defendant pleaded, Quod coram Judicibus Delegatis petiit de eodem Decimas fœni de quodam prato ipsius Samsonis in Walcot unde est in possessione per sententiam Judicum suorum, & fuit antequam Prohibitio Dom. Regis ad eum pervenerit, & quod Pratum prædict. est in Walcot unde ipse est Persona, & non in Draycot: To which the said Samson replied and said, Quod Antecessores sui antiquitus dederunt Duas acras prati Ecclesiæ de Draycot pro decimis fœni quam prædict. Thomas modo petit in eodem prato, quas quidem duas acras prati eadem Ecclesia adhuc habet, & semper hucusque habuit, unde videtur ei quod illud quod prædict. Thomas ultra petit, est de laico feodo suo, & dicit quod pratum illud in quo idem Thomas petit Decimas est in Draycot sicut Breve dicit, & non in Walcot, & de hoc ponit se super Patriam: And the Jury found, Quod prædict. Thomas Persona de Swyndon secutus fuit placita in Curia Christianitatis de Laico feodo prædict. Simsonis contra Prohibitionem Dom. Regis, petendo ab ipso Decimas fœni de quodam prato ipsius Samsonis in Draycot unde Antecessores sui antiquitus dederunt Ecclesiæ de Draycot duas acras prati pro Decima

fœni quam prædict. Thomas modo petit,& quas eadem Ecclesia adhuc habet & semper hucusque habuit,&c. Et quod Pratum prædict. in quo idem Thomas petiit Decimas est in Draycot,& non in Walcot,&c. Ideo consideratum est quod prædict. Thomas sit inde in misericord. & reddat prad. Samsoni 20. Marcas quas versus eum pro Damnis, &c. Which ancient Judgment I have recited at large, because that the same agrees with the Rule and reason of the Law continued until this day: For Judgments or Precedents in the time of Ed. 2. E. 1. H. 3. John R. 1. and more ancient are not Authorities or Precedents to be now followed, unless that they concur and agree with the Law, and common experience and practice at this day; for many Acts of Parliaments (and some of them not extant) have changed the ancient Laws in divers Cases: and Desuetude hath antiquated, and time and Custom hath taken away divers others; So as the Rule is good, Quod Judiciis posterioribus fides est adhibenda; Et à communi observantia non est recedendum. There are two points adjudged by the said Record.

1. That satisfaction may be given in discharge of payment of Tithes; And if the Successor of the Parson enjoyeth the thing given in satisfaction of the Tithes,and sueth for Tithes in kind,he shall have a Prohibition, because that he chargeth his Lay Fee with Tithes, which is discharged of them. By which it appeareth that Tithes cannot be discharged, and altogether taken away and extinct: And herewith agreeth the Register which is the most ancient Book of the Law, fol. 38. Rex,&c. tali Judici,&c. salutem. Monstravit nobis A. tenens quandam partem Manerii de D. quod licet E. nuper Dominus Manerii prædict. per quoddam scriptum Indentat. dedisset & concessisset F. nuper Personæ Ecclesiæ de D. quatuor acras terræ cum pertin. in eodem Manerio Habend. & tenend. eidem F. & successoribus suis Personæ Ecclesiæ prædict. in perpetuum. Et idem F. per prædictum scriptum de assensu & voluntate Episcopi Lincoln. Dioceſani loci prædict. & J. tunc Patroni Ecclesiæ prædict. concessit pro se & successoribus suis quod idem E. hæredes & assignati sui essent quieti de Decimis vitulorum,&c. in Manerio prædict. pro prædict. quatuor acris sibi datis,&c. Et tamen nunc Persona Ecclesiæ prædict. tenens prædict. quatuor acras terræ prædict. prædict. A. assignat. prædict. E. super decimam hujusmodi vitulorum,&c. in eodem Manerio, sibi præsentand. trahit in placitum coram,&c. in Curia Christianitatis, &c. Et quia discussio hujusmodi Donationis de laico feodo in regno nostro in Curia nostra, & non alibi tractari & fieri debet, vobis prohibemus, Quod placitum aliquod super laicum feodum in Regno nostro non teneatis in Curia Christianitatis, nec quicquam in hac parte quod in enervationem dicti scripti aut Donationis, & concessionis prædict. quæ in Curia nostra & non alibi tractari sicut prædict. est cedere poterit attententis, sive attentim faciatis quovismodo; By which also it appeareth, That Tithes may be discharged, and that the matter of discharge ought to be determined by the Common Law, and not in the Spiritual Court: And it is to be observed, That in the said Judgment, nor in the Register any aberment is taken of the value of the thing given in satisfaction of the Tithes. Also by the Act of Circumspecte agatis made 13 E. 1. it is said, S. Rector perat versus parochianos oblationes, & decimas debitas,seu consuetas,&c. which proves that there are Tithes due in kind, and other Tithes due by Custom, as a Modus Decimandi,&c. And yet it is resolved in 19 E. 3. Jurisdiction 28. That the Ordinance of Circumspecte agatis is not a Statute; and that the Prelates made the same, and yet then, the Prelates acknowledged,

That

That there were Tithes due by Custom, which is a Modus Decimandi. By which it appeareth also, That Tithes by Custom may be altered into another thing: So where a man grants a parcel of his Mannor to a Parson in Fee to be quit of Tithes, and makes an Indenture, and the Parson with the assent of the Ordinary (without the Patron) grants to him that he shall be quit of Tithes of his Mannor for that parcel of Land: Afterwards if he or his Assignee be sued in the Spiritual Court for Tithes of his Mannor, he or his Assignee shall have a Prohibition upon that Deed. And if that Deed was made before time of memory, and he hath so continued to be quit of Tithes, he shall have a Prohibition upon that Deed, if he be sued for the Tithes of that Mannor, or of any parcel of the same upon that matter shewed: See 8 E. 4. 14. F.N.B. 41. g. vi. 3 E. 3. 17. 16 E. 3. t. Annuity 24. 40 E. 3. 3. b. and F.N.B. 152. And therefore if the Lord of a Mannor hath always holden his Mannor discharged of Tithes, and the Parson had before time of memory, or in ancient times divers Lands in the same Parish of the Gift of the Lord, of which the Parson is seised at this day in Fee, in respect of which, the Parson nor any of his Predecessors ever had received any Tithes of the said Mannor: If the Parson now sueth for Tithes of the Mannor, the Owner of the Mannor may shew that special matter, and that the Parson and his Successors time out of mind have holden those Lands, &c. of the Gift of one who was Lord of the said Mannor, in full satisfaction of the Tithes of the said Mannor; And the proof, that the Lord of the Mannor gave the Lands, that Tithes should never be paid, at this day is good evidence to prove the surmise of the Prohibition. And so of the like: and 19 E. 3. t. Jurisdiction 28. it is adjudged, That Title of Prescription, shall be determined in the Kings Court: And therefore a Modus Decimandi which accrueth by Custom and Prescription in the Kings Court. And it appeareth by the Statute of 6 H. 4. cap. 6. That the Pope by his Bulls discharged divers from payment of Tithes, against which the Act of Parliament was made; and by the Statute of 31 H. 8. cap. 13. That the Possessions of Religious persons given to the King, were discharged of payment of Tithes in certain Cases: and by the Statute of 32 H. 8. cap. 7. it is provided, That all and singular persons shall divide, set out, yield, and pay all and singular Tithes and Offerings aforesaid, according to the lawful customs and usages of the Parishes and places where such Tithes or Duties shall come, or immediately arise or be due: Provided always, and be it enacted, That no person or persons shall be sued or otherwise compelled to pay any manner of Tithes, for any Mannors, Lands, Tenements, or Hereditaments, which by the Laws or Statutes of this Realm are discharged, or not chargeable with the payment of any such Tithes: And the Statute of 2 E. 6. cap. 13. Enacts, That every of the Kings Subjects shall from henceforth justifie, and truly without fraud or guile, divide, set out, &c. all manner of their predial Tithes in their proper kind as they will rise and happen, in such manner and form as hath been of right yielded and paid, within forty years next before the making of this Act, or of Right or Custom ought to be paid. So as it appeareth by this, that Tithe is due of Right, and by Custom: And also in the same Act there is a Proviso in these words; Provided always and be it enacted, That no person shall be sued, or otherwise compelled to yield, give, or pay any manner of Tithes for any Mannors, Lands, Tenements, or Hereditaments, which by the Laws and Statutes of this Realm, or by any Priviledge or Prescription, are not

chargeable

chargeable with the payment of any such Tithes, or that he be discharged by any composition real: so as it appeareth by that Act, that one may be discharged from the payment of Tithes five manner of ways.

1. By the Law of the Realm, that is, the Common Law; As Tithes shall not be paid of Coals, Quarries, Brick, Tiles, &c. F. N. B. 53. and Register 54. For of the after Pasture of a Meadow, &c. nor of Rakings, nor of Wood to make Pales, or Pounds, or Hedges, &c.

2. By the Statutes of the Realm: As by the Statute of 31 H. 8. cap. 13. the Statute of 45 E. 3. &c.

3. By Priviledge, as those of S. John's of Jerusalem in England; The Cistertians, Templars, &c. as it appeareth by 10 H. 7. 277. Dyer.

4. By Prescription, As by Modus Decimandi, or an annual Recompence in satisfaction of them, as appeareth before by the Authorities aforesaid.

5. By real Composition, as appeareth by the said Writ cited out of the Register: And so you have one or two examples (for many others which may be added) of these five manners of discharges of Tithes. And by them all it appeareth, That a man may be discharged of the payment of Tithes, as before is said: So as now it apparently appeareth by the Laws of England, both Ancient and Modern, That a Lay-man ought to prescribe in modo Decimandi, but not in non Decimando: and that in effect agrees with the Opinion of Thomas Aquinas in his Secunda secundæ, Quæst. 86. art. ultimo. For there he saith, Quod in veteri lege præceptum de solutione Decimarum, partim erat morali inditum ratione naturali quæ dictat Quod iis qui Divino Cultui ministrant ad salutem totius populi necessaria victui debent ministr. juxta illud, 1 Cor. 9. Quis militat, &c. Who goeth to War at his own charges, &c. Partim autem erat judiciale ex Divina institutione robur habens, (scil.) Quantum ad determinationem certæ partis. And all that agrees with our Law; And he goeth further, In tempore vero Novæ Legis etiam est determinatio partis solvendæ authoritate Ecclesiæ (That is by their Canons) Instituta secundum quandam humanitatem, ut scilicet non minus populus Novæ Legis Ministris novi Testamenti exhibeat, quam populus veteris Legis ministris veteris Testamenti exhibebat, præsertim cum Ministri Novæ Legis sunt majores Dignitate, ut probat Apostolus, 2 Cor. 3. Sic ergo patet Quod ad solutionem Decimarum tenentur homines partim quidem ex jure naturali, quantum ad hoc quod aliqua portio data est ministris Ecclesiæ, partim vero ex institutione Ecclesiæ quantum ad determinationem decimæ Partis. See Doctor and Student, Lib. 2. cap. 55. fol. 164. That the tenth part is not due by the Law of God, nor by the Law of Nature, which he calleth the Law of Reason: And he citeth John Gerson, who was a Doctor of Divinity, in a Treatise which he calleth Regulæ morales (scil.) Solutio Decimarum sacerdotibus est de jure Divino, quatenus inde sustententur, sed quoad tam hanc vel illam assignare aut in alios redditus commutare, positivi juris est. And afterwards, Non vocatur Portio Curatis debita propterea Decimæ, eo quod est Decima pars, imo est interdum vicesima, aut tricesima. And he holdeth, That a Portion is due by the Law of Nature, which is the Law of God, but it appertaineth to the Law of Man to assign, Hanc vel illam portionem, as necessity requireth for their Sustenance. And further he saith, That Tithes may be exchanged into Lands, Annuity, or Rent, which shall be sufficient for the Minister, &c. And there he saith, That in Italy, and in other the East Countries, they pay no Tithes, but a certain Portion according to the Custom, &c. And all this is true, if

not,

not, that Tithes be discharged or changed by one of the said five waies: And forasmuch as it appeareth by themselves, that the part or value was part of the Judiciall Law, certainly the same doth not bind any Christian Common-wealth, but that the same may be altered by reason of time, place, or other consideration, as it appeareth in all punishments inflicted by the Judiciall Law, they do not bind any, for Felony is now punished by death, &c. which was not so by the Judiciall Law, &c. Also forasmuch as now it is confessed, that the tenth part is now due, Ex institutione Ecclesiæ, that is to say, By their Canons, and it appeareth by the Statute of 25 H. 8. cap. 19. That all Canons, &c. made against the Prerogative of the King in his Laws, Statutes, or Customes of the Realm are void, and that was but a Declaratory Law; For no Statute or Custome of the Realm can be taken away or abrogated by any Canon, &c. made out or within the Realm, but only by Act of Parliament: and that well appeareth by 10 H. 7. f. 17. c. 18. That there is a Canon or Constitution, That no Priest ought to be impleaded at the Common Law. And there Brian saith, That a grave Doctor of the Law once said unto him, That Priests and Clarks might be sued at the Common Law well enough; For he said, that Rex est persona mixta, and is Persona unita cum Sacerdotibus Statutis Ecclesiæ. In which case the King might maintain his Jurisdiction by prescription; By which it appeareth that prescription doth prevail against expresse Canons or Constitutions, and is not taken away by them, which proves that the Statute of 25 H. 8. was but a Declaration of the ancient Law before: And there is an expresse Prohibition in *Numb.* 18. Nihil aliud possidebunt, Decimarum oblatione contenti quas in usus eorum & necessaria seperavi: Which was not part of the Morall Law, or Law of Nature, but part of the Judiciall: And therefore men of the holy Church at this day do possesse Houses, Lands, and Tenements, and not Tithes only. The second point which agrees with the Law at this day, which was adjudged in the said Record of 25 H. 3. is, That the limits and bounds of Towns and Parishes shall be tried by the Common Law, and not in the Spirituall Court: and in this the Law hath great reason, for thereupon depends the Title of Inheritance of the Lay Fee, whereof the Tithes were demanded for Fines, and Recoveries are the common assurances of Lay Inheritances: and if the Spirituall Court should try the bounds of Towns, if they determine that my Land lyeth in another Town than is contained in my Fine, Recovery, or other assurance, I shall be in danger to lose my Inheritance, and therewith agreeth 39 E. 3. 29. 5 H. 5. 10. 32 E. 4. t. Consultation, 3 E. 4. 12. 19 H. 6. 20. 50 E. 3. 20. & many other Precedents untill this day. And note, there is a Rule in Law, that when the Right of tithes shall be tried in the Spiritual Court, & the Spirit. Court hath jurisdiction thereof, that our Courts shall be ousted of the Jurisdiction 35 H. 6. 47. 38 H 6. 21. 2 E. 4. 15. 22 E. 4. 23. 38 E. 3. 36. 14 H. 7. 17. 13 H. 2. Juris. 19. but that is when debate is betwæn Parson and Vicar, or when all is in one Parish, but when they are in severall Parishes, then this Court shall not be ousted of the Jurisdiction. See 12 H. 2. t. Jurisdiction 17. 13 R. 2. ibid. 19. 7 H. 4. 34. 14 H. 4 17. 38 E. 3 56 42 E. 3. 12. And yet there is a Canon expresly against this, which see in Linwood titulo de pœnis 55. And so fol. 227, 228. amongst the Canons or Constitutions of Bonifice, An. Dom. 1277. And the causes wherefore the Judges of the Common Law would not permit the Ecclesiastical Judges to try Modum Decimandi, being pleaded in their Court is, because that if the Recom-

Note this difference; Although that the parties do admit the Jurisdiction of the Court, yet upon the pleading, if the right of the Tythes shall come in debate, there this Court shall be ousted of the Jurisdiction, and the Spiritual Court shall have Jurisdiction: But when the right of tythes cometh in debate, and the Spiritual Court cannot have Jurisdiction or Conusance of it, as where a Lay-man is Plaintiff as Farmor, or Defendant as servant of the Parson, as a Lay-man Farmor cannot sue there, nor he who justifies a Servant cannot be sued in Trespass: But if the Suit be between Parson and Vicar, or Parson and Parson, and other Spiritual persons, if the Kings Court be ousted of the Jurisdiction after severance of the ninth part; yet the Libel ought to be for substraction of Tythes, for of that they have Jurisdiction, and not of Tythes severed from the nine parts; for that shall be in case of a *Præmnire*, and it appeareth to the Common Law: See 16 H. 2. in the Case of Mortuary. Vide Decretalia Sexti, Lib. 3. tit. de Decimis, cap. 1, fo. 130. Col. 4. Et summa Angelica, fo. 72.

pence which is to be given to the Parson in satisfaction of his tythes doth not amount to the value of the Tythes in kinde, they would overthrow the same: And that also appeareth by Linwood amongst the Constitutions Simonis Mephum, tit. de Decimis cap. Quoniam propter, fo. 139. 6. verbo Consuetudines, Consuetudo ut non solvantur, aut minus plene solvantur Decimæ, non valet: and ibidem secundum alios, Quod in Decimis realibus, non valet Consuetudo ut solvatur minus decima parte, sed in personalibus, &c. And ibidem Lit. M. verbo, Integre, faciunt expresse contra opinionem quorundam Theologorum, qui dicunt sufficere aliquid dari pro Decima. And that is the true reason in both the said Cases, scil. de modo Decimandi, & de Limitibus Parochiarum, &c. that they would not adjudg according to their Canons; and therefore a Prohibition lieth: and therewith agreeth 8 E. 4. 14. and the other Books aboveſaid, and infinite precedents; and the rather after the Statute of 2 E. 6. cap. 13. And also the Customs of the Realm are part of the Laws of the Realm; and therefore they shall be tryed by the Common Law, as is aforesaid: See 7 E. 6. Dyer 79. and 18 Eliz. Dyer 349. the Opinion of all the Justices.

VI. Mich. 6 Jacob. in the Exchequer.

Baron and Boys Case.

Sur Stat. 2 E. 6. cap. 14. of *Ingrossers.*

IN the Case between Baron and Boys, in an Information upon the Statute of 5 E. 6. cap. 14. of Ingrossers, after Verdict it was found for the Informer, That the defendant had ingrossed Apples against the said Act: The Barons of the Exchequer held clearly, That Apples were not within the said Act, and gave Judgment against the Informer upon the matter apparant to them, and caused the same to be entered in the Pargent of the Record where the Judgment was given: and the Informer brought a Writ of Error in the Exchequer chamber, and the only Question was, Whether Apples were within the said Act? the letter of which is, That whatsoever person or persons, &c. shall ingross or get into his or their hands, by buying, contracting, or promise, taking (other than by Demise, Grant or Lease of Land, or Tythe) any Corn growing in the Fields, or any other Corn or grain, Butter, Cheese, Fish, or other dead Victual within the Realm of England, to the intent to sell the same again, shall be accepted, &c. an unlawfull Ingrosser. And although that the Statute of 2 E. 6. cap. 15. made against Sellers of Victual, which for their great gain conspire, &c. numbereth Butchers, Brewers, Bakers, Cooks, Costermongers and Fruiterers, as Victuallers: yet Apples are not dead Victuals within the Statute of 5 E. 6. For the Buyers and Sellers of Corn and other Victuals have divers Provisoes and Qualifications for them, as it appeareth by the said Act, but

Costers

Costermongers and Fruiterers have not any Proviso for them: also, always after the said Act they have bought Apples and other Fruits by Ingross, and sold them again, and before this time no Information was exhibited for them, no more than for Plums or other fruit, which serveth more for delicacy than for necessary Food. But the Statute of 5 E. 6. is to be intended of things necessary and of common use for the sustenance of man: and therefore the words are, Corn, Grain, Butter, Cheese, or other dead Victual: which is as much to say, as Victual of like quality, that is, of like necessary and common use: But the Statute of 2 E. 6. cap. 15. made against Conspiracies to enhaunce the prices, was done and made by express words, to extend it to things which are more of pleasure than of profit: So it was said, That of those Fruits a man cannot be a Forestaller within this Act of 5 E 6. for in the same Branch the words are, any Merchandize, Victual, or any other thing. But this was not resolved by the Justices, because that the Information was conceived upon that branch of the Statute concerning Ingrossers.

VII. Hil. 27 Eliz. in the Chancery.

Fine. Dower. Relation.

HIlary Term, the 27 of Eliz. in the Chancery the Case was thus: One Ninian Menvil seised of certain Lands in Fee, took a wife, and levyed a Fine of the said Lands with proclamations, and afterwards was indicted and out-lawed of High Treason, and dyed: The Consuless convey the Lands to the Queen, who is now seised, the five years pass after the death of the Husband: The Daughters and Heirs of the said Ninian, in a Writ of Error in the Kings Bench, reverse the said Attainder, M. 26 and 27 Eliz. last past: and thereupon the Wife sueth to the Queen (who was seised of the said Land as aforesaid) by Petition containing all the special matter, scil. the Fine with proclamations, and the five years passed, after the death of her Husband, the Attainder and the reversal of it: and her own title, scil. her marriage, and the seisin of her Husband before the Fine: And the Petition being endorsed by the Queen, Fiat droit aux parties, &c. the same was sent into the Chancery, as the manner is.

And in this case divers Objections were made against the Demandant.

1. That the said Fine with proclamations should bar the Wife of her Dower, and the Attainder of her Husband should not help her; for as long as the Attainder doth remain in force, the same was a bar also of her Dower, so as there was a double bar to the Wife, viz. the Fine levyed with proclamations, and the five years past after the death of her Husband, and the Attainder of her Husband of his Treason. But admit that the Attainder of the Husband shall avail the Wife in some manner, when the same is now reversed in a Writ of Error, and now upon the matter is in Judgment of Law, as if no Attainder had been: and against that a man might plead, That there is no such Record, because that the first Record is reversed, and utterly disaffirmed and annihilated, and now by Relation made no Record ab initio: and therewith agreeth the Book of 4 H. 7. 11. for the words of the Judgment in a Writ of Error are, Quod Judicium prædict. & Errores prædict. & alios in Recordo, &c. revocetur & admittetur, &c. & quod ipsa ad possessionem suam sive seisinam suam (as the case requireth) tenementorum

mentorum suorum prædictorum, una cum exitibus & proficuis inde à tempore judicii prædict. reddit. percept. & ad omnia quæ occasione Judicii illius amisit restituatur. By which it appeareth, that the first Judgment, which was originally imperfect and erroneous, is for the same Errors now adnulled and revoked ab initio, and the party against whom the Judgment was given restored to his possession, and to all the mean profits, from the time of the erroneous Judgment given, until the Judgment in the Writ of Error, so as the Reversal hath a Retrospect to the first Judgment, as if no Judgment had been given: And therefore the Case in 4 H. 7. 10. b. the case is, A. seised of Land in Fee, was attainted of High Treason, and the King granted the Land to B. and afterwards A. committed Trespass upon the Land, and afterwards by Parliament A. was restored, and the Attainder made void, as if no Act had been; and shall be as available and ample to A. as if no Attainder had been: and afterwards B. bringeth Trespass for the Trespass Mesne; and it was adjudged in 10 H. 7. fol. 22. b. That the Action of Trespass was not maintainable, because that the Attainder was disaffirmed and annulled ab initio. And in 4 H. 7. 10. it is holden, That after a Judgment reversed in a Writ of Error, he who recovered the Land by Erroneous Judgment shall not have an Action of Trespass for a Trespass Mean, which was said, was all one with the principal case in 4 H. 7. 10. and divers other Cases were put upon the same ground.

It was secondly objected, That the Wife could not have a Petition, because there was not any Office by which her title of Dower was found, scil. her marriage, the seisin of her Husband, and death: for it was said, that although she was married, yet if her Husband was not seised after the age that she is Dowable, she shall not have Dower: as if a man seised of Land in Fee, taketh to Wife a woman of eight years, and afterwards before her age of nine years, the Husband alieneth the Lands in Fee, and afterwards the woman attaineth to the age of nine years, and the Husband dieth; it was said, that the woman shall not be endowed. And that the title of him who sueth by Petition ought to be found by Office, appeareth by the Books in 11 H. 4. 52. 29 Ass. 31. 30 Ass. 28. 46 E. 3. bre. 618. 9 H. 7. 24. &c.

As to the first Objection, it was resolved, That the Wife should be endowed, and that the Fine with proclamations was not a bar unto her, and yet it was resolved that the Act of 4 H. 7. cap. 24. shall bar a woman of her Dower by a Fine levied by her Husband with proclamations, if the woman doth not bring her Writ of Dower within five years after the death of her Husband, as it was adjudged Hill. 4 H. 8. Rot. 344. in the Common Pleas, and 5 Eliz. Dyer 224. For by the Act, the right and title of a Feme Covert is saved, so that she take her action within 5. years after she become uncovert, &c. but it was resolved, That the wife was not to be aided by that saving: for in respect of the said Attainder of her Husband of Treason, she had not any right of Dower at the time of the death of her Husband, nor can she after the death of her Husband bring an Action, or prosecute an Action to recover her Dower, according to the direction and saving of the said Act: But it was resolved, That the Wife was to be aided by another former Saving in the same Act, viz. And saving to all other persons (scil. who were not parties to the Fine) such action, right, title, claim, and interest in or to the said Lands, &c. as shall first grow, remain, descend, or come to them after the said Fine ingrossed and proclamations made,

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by force of any Gift in Tail, or by any other cause or matter had and made before the said Fine levied, so that they take their Actions and pursue their right and Title according to the Law, within five years next after such Action, Right, Claim, Title, or Interest to them accrued, descended, fallen, or come, &c. And in this case the Action and right of Dower accrued to the wife after the reversal of the Attainder, by reason of a Title of Record before the Fine by reason of the seisin in Fæ (had) and the Marriage (made) before the Fine levied, according to the intention and meaning of the said Act.

And as to the said point of Relation, It was resolved, That sometimes by construction of Law a thing shall relate ab initio to some intent, and to some intent not; For Relatio est fictio Juris, to do a thing which was and had essence, to be annulled ab initio, betwixt the same parties to advance a Right, or Ut res magis valeat quam pereat: But the Law will never make such a construction to advance a wrong, which the Law abhorreth, Or to defeat Collaterall Acts which are lawfull, and principally if they do concern Strangers: And this appeareth in this Case (scil.) when an erroneous Judgment is reversed by a Writ of Error: For true it is as it hath been said, That as unto the mean Profits, the same shall have relation by construction of Law, untill the time of the first Judgment given, and that is to favour justice and to advance the right of him who hath wrong by the erroneous Judgment. But if any stranger hath done a Trespass upon the Land in the mean time, he who recovereth after the Reversall shall have an action of Trespass against the Trespassors, and if the Defendant pleadeth that there is no such Record, the Plaintiff shall shew the speciall matter, and shall maintain his Action, so as unto the Trespassors who are wrong Doers, the Law shall not make any construction by way of relation ab initio to excuse them, for then the Law by a fiction and construction should do wrong to him who recovereth by the first Judgment: And for the better apprehending of the Law on this point, it is to know, That when any man recovers any possession or seisin of Land, in any Action by erroneous Judgment, and afterwards the Judgment is reversed as is said before, and upon that the Plaintiff in the Writ of Error shall have a Writ of Restitution, and that Writ recites the first recovery, and the reversall of it in the Writ of Error, is, that the Plaintiff in the Writ of Error shall be restored to his possession and seisin, Una cum exitibus thereof from the time of the Judgment, &c. Tibi præcipimus quod eundem A. ad plenariam seisinam tenementorum prædict. cum pertinentiis sine dilatione restitui facias, & per sacramentum proborum & legalium hominum de Com. suo diligenter inquiras ad quantum exitus & proficua tenementorum illorum cum pertinentiis à tempore falsi Judicii prædict. reddit. usque ad Oct. Sanct. Mich. anno, &c. quo die judicium illud per præfat. Justiciar. nostros revocat. fuit, se attingunt, juxta verum valorem eorundem, eadem exitus & proficua de terris & catallis prædict. B. in baliva tua fieri facias, & denarios inde præfato A. pro exitibus & proficuis tenementorum per eundem B. dicto medio tempore percept. sine dilatione haberi facias: Et qualiter hoc præceptum nostrum fuerit execut. constare facias, &c. in Octab. &c. By which it appeareth, That the Plaintiff in the Writ of Error shall have restitution against him who recovereth of all the mean Profits, without any regard by them taken; for the Plaintiff in the Writ of Error cannot have any remedy against any stranger, but onely against him who is party to the Writ of Error, and therefore the words of the said Writ command

command the Sheriff to enquire of the Issues and Profits generally, between the Reversal and the Judgment, with all which he who recovers shall be charged, and as the Law chargeth him with all the mean profits, so the Law gives to him remedy notwithstanding the Reversal against all Trespassors in the interim, for otherwise the Law should make a construction by relation to discharge them who are wrong doers, and to charge him who recovers with the whole, who peradventure hath good right, and who entereth by the Judgment of the Law, which peradventure is reversed for want of form, or negligence or ignorance of a Clark. And therefore as to that purpose the Judgment shall not be reversed, ab initio, by a Fiction of Law, but as the truth was, the same stands in force until it was reversed: and therefore the Plaintiff in the Writ of Error after the Reversal shall have an Action of Trespass for a Trespass mean, because he shall recover all the mean profits against him who recovered, nor he that recovereth after shall be barred of his Action of Trespass for a Trespass mean, by reason that his recovery is reversed, because he shall answer for all the mean profits to the Plaintiff in the Writ of Error: and therewith agreeth Brian Chief Justice, 4 H. 7. 12. a.

Note Reader, If you would understand the true sence and Judgment of the Law, it is needful for you to know the true Entries of Judgments, and the Entries of all proceedings in Law, and the manner and the matter of Writs of Execution of such Judgments. See Butler and Bakers Case, in the third part of my Reports, good matter concerning Relations. So as it was resolved in the Case at Bar, Although that to some intent the Reversal hath relation, yet to bar the Wife of her Dower by Fiction of Law, by the Fine with proclamations, and five years past after the death of her Husband, when in truth she had not cause of Action, nor any right or title so long as the Attainder stood in force, should be to do wrong by a Fiction of Law, and to bar the Wife, who was a mere stranger, and who had not any means, to have any Relief until the Attainder was reversed.

And as unto the other point or Objection, that the Demandant on the Petition ought to have an Office found for her, it was resolved, that it needed not in this case, because that the title of Dower stood with the Queens title, and affirmed it; otherwise if the title of the Demandant in the Petition had disaffirmed the Queens title: also in this Case, the Queen was not entituled by any Office that the Wife should be driven to traverse it, &c. for then she ought to have had an Office to find her title: But in Case of Dower, although that Office had been found for the Queen which doth not disaffirm the title in Dower, in such case the Wife shall have her Petition without Office, because that Dower is favoured in Law, she claiming but onely for term of life, and affirming the title of the Queen. See the Sadlers Case in the fourth part of my Reports.

And the case which was put on the other side was utterly denyed by the Court, for it was resolved, That if a man seised of Lands in Fee, taketh a Wife of eight years of age, and alieneth his Lands, and afterwards the Wife attaineth to the age of nine years, and afterwards the Husband dyeth, that the Wife shall be endowed: For although at the time of the alienation the Wife was not dowable, yet for as much as the Marriage, and seisin in Fee, was before the alienation, and the title of Dower is not consummate until the death of her Husband, so as now there was marriage, seisin of Fee, age of nine years during

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the Coverture, and the death of the Husband, for that cause she shall be endowed: For it is not requisite that the marriage, seisin and age concur together all at one time, but it is sufficient if they happen during the Coverture: So if a man seised of Lands in Fee take a Wife, and afterwards she elopes from her Husband, now she is barrable of her Dower, if during the Elopement the Husband alieneth, and after the Wife is reconciled, the Wife shall be endowed: So if a man hath issue by his Wife, and the issue dyeth, and afterwards Land descendeth to the Wife, or the Wife purchaseth Lands in Fee, and dyeth without any other issue, the Husband (for the issue which he had before the Descent or purchase) shall be Tenant by the curtesie, for it is sufficient if he have issue, and that the wife be seised during the Coverture, although that it be at several times. But if a man taketh an Alien to Wife, and afterwards he alieneth his Lands, and afterwards she is made a Denizen, she shall not be endowed, for she was absolutely disabled by the Law, and by her birth not capable of Dower, but her capacity and ability began onely by her Denization; but in the other case there was not any incapacity or disability in the person, but onely a temporary Bar, until such age or reconcilement, which being accomplished the temporary Bar ceaseth: As if a man seised of Lands in Fee, taketh a Wife, and afterwards the Wife is attainted of Felony, and afterwards the Husband alieneth, and afterwards the Wife is pardoned, and afterwards the Husband dieth, the Wife shall be endowed, for by her birth she was not uncapable, but was lawfully by her marriage and seisin in Fee entituled to have Dower; and therefore when the impediment is removed, she shall be endowed.

VIII. Trinit. 44 Eliz. In the Kings Bench.

Sprat and Heals Case.

Tythes. Covin.

John Sprat Libelled in the Spiritual Court against Walter Heal for subtraction of Tythes, the Defendant in the Spiritual Court pleaded, that he had divided the Tythes from the nine parts: and then the Plaintiff made addition to the Libel (in the nature of a Replication) scil. That the Defendant divided the Tythes from the nine parts, quod prædict. the Plaintiff non fatetur, sed prorsus diffitetur; yet presently after this pretended division in fraudem legis, he took and carried away the same Tythes, and converted them to his own use; and the Plaintiff thereupon obtained sentence in the Spiritual Court, and to recover the treble value according to the Statute of 2 E. 6. cap. 13. And thereupon Heal made a surmise, that he had divided his Tithes, and that the Plaintiff ought to sue in the Spiritual Court for the double value, and at the Common Law for the treble value: And it was objected, That when the Owner of the Corn divides them, then they are become Lay-Chattels, for the taking of which an action lyeth at the Common Law: and therefore after severance from the nine parts, the Parson shall not sue for them in the Spiritual Court: But it was resolved by the whole Court, That the said division or severance mentioned in the Libel, was not any division or severance within the Statute of 2 E. 6. cap. 13. For the same Act provides, That every of the Kings Subjects shall from henceforth truly and justly without fraud or

or guile, divide, ſet out, yield, and pay all manner of other prædiall Tithes in their proper Land, ſo as when he divides them to the purpoſe to carry them away, he doth not divide them juſtly and truly without fraud or guile, but here is fraud and guile, and no way a juſt diviſion, and therefore the ſame is out of the Statute, for the makers of the Statute reſpect quo animo he divides them (ſcil.) with a mind and intention that the Parſon carry them away, as in right he ought, or with a mind and intention that he himſelf carry them away which he ought not, Quia fraus & dolus alicui prodeſſe, aut ſimplicitas alicui obeſſe non debet: And the ſame is Crimen Stellionatus, which we call fraudem rem & impoſteram: And where the words of the Statute are divided, ſet out, &c. their prædiall Tithes, &c. And if any perſon carrieth away his Corn and Hay, and his and their prædiall Tithes, &c. And to make an evaſion out of theſe words, this Invention was deviſed, the Owner of the Corn by Cobin ſold his Corn before ſeverance to another, who as Servant to the Vendee reaped the Corn, and carried away the Corn, without any ſeverance, pretending that neither the Vendee, becauſe he did not carry them away, nor the Vendor becauſe he had no property in them, for he did not carry away his Corn, or his prædiall Tithes, ſhould be within that Statute: But it was reſolved, that the Vendor ſhould be charged in that caſe with the penalty of the Statute, for he carrieth them away, and his fraud and cobin ſhould not help him or avail him. See 8 E. 3. 290. A reall Action brought by a man of Religion by Colluſion, although that he hath right, yet he ſhall not have execution, 9 H. 6. 41. A recovery upon a good Title by Colluſion, ſhall not abate the Writ, 33 H. 6. 5. A ſale in open Market by Cobin ſhall not bind the property of a ſtranger: But it was reſolved, That the Plaintiff could not ſue in the Spirituall Court for the treble value, but for the double value that he might.

IX. Hill. 6 Jacobi, In the Common Pleas.

Neale and Rowſes Caſe.

Extortion. Stat. 21 H. 8. cap. 5.

AT a Niſi prius in London, before my ſelf this Term, the Caſe was this: Edward Neale informed upon the Statute of 21 H. 8. cap. 5. which Plea begun Mich. 6 Jac. Rot. 1031. againſt James Rowſe Commiſſary and Officiall within the Archdeaconry of Huntington, within the Dioceſe of Lincoln, and having probat of Wills and Teſtaments, &c. within the ſame Archdeaconry; And that Nicholas Neale, the third year of the Raign of the King that now is, made his Teſtament and laſt Will in writing, and made the Plaintiff his Executor, and died poſſeſſed of Goods and Chattels to the value of a hundred and fifty pounds: The Defendant then Commiſſary and Officiall, &c. the twenty third of Febr. 1605. at the Pariſh of S. Mary Bow, Teſtament. prædict. probavit, inſinuavit, regiſtravit & ſigillavit; ac per manus cujuſdam Thomæ Nicke tunc miniſtri ipſius Jacobi Rowſe in ea parte deputat. & authorizat. 14. s. 10 d. pro probatione, inſinuatione & regiſtratione Teſtamenti prædict. de eodem Edwardo, &c. qui tam, &c. colore Officii ſui prædict. adtunc & ibidem extortive recepit, & habuit contra formam ſtatuti prædict. with this that the ſaid Edward, qui tam, &c. will add, That the writing of the ſaid Teſtament according to the rate of a peny for every ten Lines of the ſaid Teſtament, every line thereof containing

ing in length ten Inches, non attingebat, to the ſumme of twelve ſhillings four pence, according to the form of the Statute aforeſaid, &c. The Defendant pleaded Nihil debet, And at the Niſi prius, the Evidence of two Witneſſes was, That the Plaintiff cauſed the ſaid Teſtament which was in Paper, to be ingroſſed in Parchment; And the Plaintiff offered both to the ſaid Rowſe, the Official, to be proved, and he anſwered, That he would prove it, if his Fees ſhall be paid to him, And the Plaintiff asked him what were his Fees, and he wrote them in a paper, which amounted to fourteen ſhillings ten pence for the Probat, Inſinuation, Regiſtring, and Sealing: And thereupon the Plaintiff layed upon the Table twenty ſhillings, and deſired him to take as much as was due to him, and all that was in the houſe of the Official; But he would receive nothing there, but appointed the Plaintiff to come in Court, where he would receive his Fees, and accordingly the Plaintiff came to him in Court, and prayed to have the ſaid Will proved; And the Defendant required the ſaid Nicke his Miniſter, to take of him for the probation, inſinuation, regiſtring, and ſealing, fourteen ſhillings ten pence, and thereupon he put the Seale of his Office to the ſaid Parchment ingroſſed, which the Plaintiff brought with him, and which he delibered to the Defendant. And it was objected, That this Caſe was out of the ſaid Statute, for thereby as to this purpoſe, it is probided, viz. And where the Goods of the Teſtator, &c. amount above the value of forty pounds, That then the Biſhop, nor Ordinary by him or themſelves, nor any of his or their Regiſters, Scribes, Prayſers, Summoners, Apparators, or any other their Miniſters, for the probation, inſinuation, and approbation of any Teſtament or Teſtamens, &c. for the regiſtring, ſealing, writing, prayſing, making of Inventories, making Acquittances, Fines, or any thing concerning the ſame Probate of Teſtaments, ſhall take or cauſe to be taken of any perſon or perſons, but only five ſhillings, and not above, whereof to the Biſhop, Ordinary, &c. for him and his Miniſters two ſhillings ſix pence, and not above, and two ſhillings ſix pence to the Scribe for Regiſtring of the ſame, &c. And it was objected by the Councell of the Defendant, that the Defendant did not take the fourteen ſhillings ten pence for the probation, inſinuation, regiſtring, or ſealing of the Teſtament, for no Probate was written upon the Teſtament it ſelf, nor any Seale put to it, but the Teſtament was ingroſſed in Parchment, and the Probat and Seale put to the Tranſcript ingroſſed, and not to the Teſtament it ſelf, and ſo out of the Statute; and the Statute extends only, when the Probat and Seale is put to the Teſtament it ſelf, and for the ingroſſing of it after the Probate, no certain Fee is probided by the Statute; But for the Regiſtring of it after it is proved, there is an expreſſe Fee in the Statute: But I conceived that the ſaid taking of the fourteen ſhillings ten pence in the Caſe at Bar, was directly againſt the Statute. For the Act is in the Negative, and if the Executor requireth the Teſtament to be ingroſſed in Parchment, he ought to agree with him whom he requireth to do it, as he may: But the Ordinary, Official, &c. ought not to exact any Fee for the ſame of the party as a thing due to him, for divers Cauſes:

1. Becauſe the words of the Act are expreſſed, for the Probation, &c. and for the regiſtring, ſealing, writing, prayſing, making of Inventories, Fines, giving of Acquittances, &c. which word (writing) extends expreſly to this Caſe.

2. The words are, Or any thing concerning the same Probate, and when the Seal and Probate is put to the Transcript, the same without question concerns the Probate, for the Probate is not put to any writing but onely to that, therefore the same concerns the Probate.

3. Such a construction should make the Act idle and vain, for if the Ordinary, Official, &c. might take as much as he pleaseth for the ingrossing done by his Ministers as a Fee due to him, all the purview of the Statute which is penned so precisely concerning persons, scil. Bishops, Ordinaries, and all persons who have power to prove Wills and Testaments, Registers, Scribes, Summoners, Apparators, or any other the Ministers, as for the thing it self, scil. the probation, insinuation, approbation, registring, sealing, writing, praysing, making of Inventories, Fines, giving of Acquittances, or any other thing concerning the same, should be all in vain, by that evasion of Transcribing of it, as well against the expresse Letter of the Act as the intention and moving of it: Also the Statute saith five shillings, and not above, so as the manner of precise penning of it excludes all nice evasions: And the Act ought to be expounded to suppresse Extortion, which is a great affliction, and impoverishing of the poor Subjects.

4. As this Case is, he annexeth the Probate and Seal to the Transcript ingrossed, which the Plaintiff brought with him and offered to the Defendant; so as the Case at Bar was without question, And generally the Ordinary, Official, &c. cannot exact or take any Fee for any thing which concerns the Probate of a Will or Testament, but that which the Statute limits: And afterwards the Jury found for the Plaintiff, and of such opinion was Walmesley, Warberton, Daniel, and Foster Justices, the next term in all things, But upon exception in Arrest of Judgment for not pursuing of the Act, in the Information, Judgment is not yet given, &c.

X. Hilar. Anno 6 Jacobi Regis. In the Common Pleas.

Aide to make the Kings eldest Son Knight.

NOta that in this Term, a Question was moved to the Court, which was this: If Tenant in Burgage should pay Ayde unto the King to make his eldest Son Knight. And the Point rests upon this, If the Tenure in Burgage be a Tenure in Socage; For by the ancient Common Law every Tenant in Knights Service, and every Tenant in Socage, was to give to his Lord a reasonable Ayde to make his eldest Son a Knight, and to marry his eldest Daughter, and that was incertain at the Common Law, and also incertain when the same should be paid. And this appeareth by Glanvil, Lib. 9. cap. 8. fol. 70. who wrote in the time of Henry the second, Nihil autem certum statutum est de hujusmodi auxiliis dandis, vel exigendis, &c. sunt alii præterea Casus in quibus licet Dominis auxilia solvenda sunt certa forma præscripta ab hominibus suis ut filius suus & hæres fiat miles, vel si primogenitam suam filiam maritaverit, &c. And in the beginning of the Chapter, it is called Rationabile Auxilium, because that then it was not certain, but to be moderated by reason in respect of Circumstances: And by the Preamble of the Statute of Westmin. 1. An. 3 E. 1. cap. 35. where it is said, Forasmuch as before that time reasonable Ayde to make ones Son Knight, or to marry his Daughter, was never put in certain,

Vide F. N. B. 82. ac.

See the statute of 27 H. 8. cap. 10. of uses in the Preamble, concerning Aides, to make the eldest Son Knight, and to marry the Daughter.

certain, nor when the same ought to be payd, nor how much be taken; the said Act put the said two incertainties to a certainty, 1. That for a whole Knights Fee there be taken but 20 s. and of 20 l. Lands holden in Socage 20 s. and of more, more, and of less, less, according to the rate; by which the Ayd it self was set certain. 2. That none might levy such Ayd, to make his son a Knight, untill his son be of the age of fifteen years; nor to marry his daughter, untill she be of the age of seven years. And Fleta, who wrote after the said Act, calls them rationabilia auxilia ad filium militem faciendum, vel ad filiam primogenitam maritandum: And by the Statute of 25 E. 1. where it is provided, That no Taxes shall be taken but by common consent of the Realm, there is an exception of the ancient Ayds, &c. which is to be intended of these Ayds due unto the King by the ancient Common Law: But notwithstanding the said Act of Westm. 1. it was doubted, whether the King, because he is not expressly named, were bound by it; and therefore in the twentieth year of E. 3. the King took an Ayd of 40 s. of every Knights Fee for to make the Black Prince Knight, and nothing then of Lands holden in Socage; and to take away all question concerning the same, the same was confirmed to him in Parliament: and afterwards, anno 25 E. 3. cap. 11. it is enacted, That reasonable Ayd to make the Kings eldest Son Knight, and to marry his eldest Daughter, shall be demanded and levyed after the form of the Statute made thereof, and not in other manner, that is to say, Of every Fee holden of the King without Mean 20 s. and no more, and of every 20 l. Land holden of the King without Mean in Socage 20 s. and no more. Now Littleton, lib. 2. cap. 10. fol. 36. b. Burgage Tenure is, where an ancient Borough is, of which the King is Lord; and those who have Tenements within the Borough, hold of the King their Tenements, that every Tenant for his Tenement ought to pay to the King a certain Rent: and such Tenure is but Tenure in Socage; and all Socage Land is contributary to Ayd, and therefore a Tenant in Burgage shall be contributary to it.

And it is to be observed, and so it appeareth in the Register, fo. 1, & 2. That in a Writ of Right, if the Lands or Tenements are holden by Knights service, it is said, Quas clamat tenere de te per servitium unius feodi Militis: and if the Lands be holden in Socage, the Writ is, Quas clamat tenere de te per liberum servitium unius libræ cumini, &c. so as Socage Tenure in all Writs is called Liberum servitium. And by the Writ of Ayd, Fitz. N. B. 82. it is commanded to the Sheriff, Quod juste, &c. facias habere A. rationabile Auxilium de Militibus, & liberis tenentibus suis in Baliva tua, &c. so as the same Writ makes a distinction of Knights service by the name of Militibus, and of Socage by the name of Liberis tenentibus. And in the Register, fol. 2. 6. the Writ of Right for a House in London (which is holden of the King in Burgage) is in these words, Rex, Majori, vel Custodi & Vicecom. London: Præcipimus vobis quod sine dilatione teneatis G. de uno Messuagio, &c. in London, quæ clamat tenere de nobis per liberum servitium, &c. which proves, That Tenure in Burgage is a Tenure in Socage: But it appeareth by the Books of Avowry 26. and 10 H. 6. so Ancient Demesne 11. it was resolved by all the Justices in the Exchequer Chamber, That no Tenure should pay for a reasonable Ayd to marry the Daughter, or to make the Son a Knight, but Tenure by Knights service, and Tenure by Socage; but not Tenure by Grandserjeanty, nor no other: and 13 H. 4. 34. agrees to the Case of Grand-

ſerjeanty: and by the ſaid Books it appeareth, that Tenure by Frankalmoign, and Tenure by Divine Service, ſhall not pay, for they are none of them: but Tenure in Burgage is a Tenure in Socage; and therefore the ſaid Books probe, that ſuch a Tenure ſhall pay Ayd. And I conceive, that Tenure by Petit-Serjeanty ſhall pay alſo Ayd: for Litt. lib. 2. cap. 8. fo. 36. ſays, that ſuch a Tenure is but Socage in effect: but Fitz. N. B. 83. a. abouncheth, 13 H. 4. 34. That Tenant by Petit-Serjeanty ſhall not pay Aid; but the Book onely extends to Grand-Serjeanty: If the Houſes in a City or Borough are holden of the King in Burgage, and the King grant the Seignories to one, and the City or Borough to another to hold of him, then thoſe Houſes ſhall not be contributary to Aid, for they are not immediately holden of the King, as is required by the Law.

And I conceive that he who holdeth a Rent of the King by Knights ſervice, or in Socage, ſhall pay Ayd; for the words of the Act of Weſtm. 1. cap. 35. are, From henceforth of a whole Knights Fee onely be taken 20 s. of 20 l. Land holden in Socage 20 s. and the Mean is ſaid in ſuppoſition of Law to hold the Land: and it is not reaſon that the Tenant by his Feoffment before the Statute ſhould prejudice the Lord of his benefit. And although it was ſaid, that a Tenure in Socage, is ſervitium Socæ, as Littleton ſaith, and the ſame cannot be applyed to Houſes: to that it was anſwered, That the Land upon which the houſe is built, or if the Houſe falleth down, may be made arable, and be ploughed. And a Rent may be holden in Socage, and yet it is not ſubject to be plowed, but by a poſſibility after words eſcheat to the Lord of the Land. See Huntington, Polydor Virgil, and Hollinſheds Chronicle, fol. 35. 15 H. 4. Ayd was levyed by Hen. 7. 1. to marry Mawd his eldeſt Daughter to the Emperor, viz. 3 l. of every Hide of Land, &c. And ſee The Grand Cuſtomary of Normandy, cap. 35. there is a Chapter of Ayds, whereof the firſt is, to make the eldeſt Son of his Lord a Knight; and the ſecond to marry his eldeſt Daughter. And ſee a Statute made in anno 19 H. 7. which beginneth thus, Item præfati Communes in Parliamento prædicto exiſtentes ex aſſenſu dominorum Spiritualium & Temporalium in dicto Parliamento ſimiliter exiſter. conceſſerunt præfato Regi quandam pecuniæ ſummam in loco duorum rationabilium auxiliorum ſuæ Majeſtati de jure debit. tam ratione creationis nobiliſſimi filii ſui primogeniti bonæ memoriæ, Domini Arthuri nuper Principis Walliæ, quam ratione Matrimonii & traductionis nobiliſſimi Principis Margaritæ filiæ ſuæ primogenit. quam etiam multiplicare pro Regni ſui perpetua pace & tranquillitate, &c. certis viis & modis levand. cujus quidem conceſſionis Tenor, &c. ſequitur in hæc verba: For as much as the King our Soveraign Lord is rightfully intituled to have two reaſonable Aids according to the Laws of this Land, the one for the making Knight the right honorable his firſt begotten Son Arthur, late Prince of Wales deceaſed, and the other, for the marriage of the Right Noble Princeſs his firſt begotten Daughter Margaret, now married to the King of Scots: and alſo that his Highneſs hath born great and ineſtimable charges for the defence of the Realm, &c. conſidering the premiſſes; And if the ſame Ayds ſhould be levyed, and had by reaſon of their Tenures according to the ancient Laws of the Land, ſhould be to them doubtful and uncertain, and great unquietneſs, for the ſearch and not knowledge of their ſeveral Tenures, and their Lands chargeable to the ſame, have made humble Petition unto his Highneſs, graciouſly to accept and take of them the ſum of 40000 l.

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as well in recompence and satisfaction of the said two Ayds, as for the said great and inestimable charges, &c. as is aforesaid. The King, to eschew and avoyd the great vexation, troubles and unquietness which to them should have ensued, if the said Ayds were levyed after the ancient Laws: and for the good and acceptable services of the Nobles of this Realm, and other his faithful Subjects, in their own persons and otherwise, done to his Grace, and thereby sustained manifold costs and charges, to his great honor and pleasure, doth pardon the said two Ayds, and accepteth the offer aforesaid: and that the power of his said Commons should not be contributary to the said sum of 40000 l. hath pardoned 10000 l. parcel thereof, and doth accept of 30000 l. in full satisfaction, &c. And that the Cities and Boroughs, Towns and places, being in every Shire not by themselves accountable in the Exchequer for Fifteens and Tenths, be chargeable with the Shires, &c. And all Cities and Boroughs, not contributary, &c. but accountable by themselves, &c. shall be chargeable by themselves towards the payment of the said 30000 l. with such sums as under the Act particularly appear, &c. And there under the Act appear the several Taxations of every several County, City, Borough, &c. and that the City of London is taxed to 6181 l. 3 s. 5 d. the City of Norwich to 8 l. 6 s. 11 d. the City of Canterbury to 53 l. 13 s. 3 d. ob. Norfolk 286 l. 6 s. 10 d. Suffolk 1214 l. 5 s. 4 d. ob. &c. The sum of all the sums then expressed is 31648 l. whereof allowable for Fees and Wages of Commissioners and Collectors 651 l. 16 s. 2 d. and so remaineth 31006 l. 4 s. and 10 d. Note, that the Universities of Cambridge and Oxford, and the College of Eaton be excepted.

See Rot. 30 H. 3. ex parte remanc. Dom. Thesaur. in Scemino, in auxilio nobis concess. ad primogenitam filiam nostram maritand. And note, that King Henry the third had Ayd granted to him in Parliament ad Isabellam sororem suam Imperatori maritand. but that was of Benevolence.

Rot. 42 H. 3. ibid. 6. Monstrat R. Johannes le Francois Baro de Scaccario, quod cum Dominus Rex non caperet nisi 20 s. de integro feodo militis de auxilio ad primogenitam filiam suam maritand. Radol. fil. Rad. fil. Mich. injuste exegit de eodem 30 s. ad primogenitam filiam suam maritand. pro duabus partibus unius feodi militis, & averia sua cepit, & ea detinet. Et ideo mandatum est Vic. Com. Bedd. & Buck. quod venire faciant, &c. prædict. R. ad respondendum eidem Johanni de prædict. transgressione, & prædict. averio, &c. So as it appeareth by this, that some held, that the Statute of Westm. 1. aforesaid was but a confirmation of the Common Law, and that the King also ought not to take more: but that was doubted.

Ibid. in Regno 2 E. 1. Rot. 3. de auxilio ad militiam, (which is meant of Knight of the Kings Son) in the time of Henry the third, & Isabella Comitissa Albermarle, perdonata 116 l. 8 s. 7 d. pro eodem auxilio, quia Boldwinus de Insula frater ejus cujus hæres ipsa est fuit infra ætatem, & in custodia ejus: & quia tenentes dictæ Isabellæ onerentur per servitium militare de prædict. pecuniis. Note, that that was before the Statute of West. 1. and by that it appeareth, That if one within age be in Ward of the King, he shall not be contributary to Ayd, but his Tenants which hold of him (and then held of the King by reason of Ward) shall pay Ayd unto the King, as it appeareth by that Record.

Ibid. 30 E. 1. Rex dilectis & fidelibus, Vic. Kanc. & Rico. de R. salutem,

salutem, Sciatis, quod in primo die Junii anno Regni nostri 18. Prælati, Comites, Barones, & cæteri Magnates, de regno nostro conceditur, pro se & tota communitate ejusdem Regni in pleno Parliamento nostro, nobis concesserunt 40 s. de singulis feodis militum in dicto Regno ad auxilium ad primogenitam filiam nostram maritand. levandos, sicut hujusmodi auxilium alias in casu consimil. levari consuevit, cui quidem levationi faciend. pro dicta communitatis easiamento hucusque supersedimus faciend. gratiose assignavimus vos ad prædictum auxilium, &c. Note that his eldest Daughter was marryed to the Earl of Bar.

Note, that this double charge was in respect that they were discharged of any contribution for Socage, which I conceive was for the difficulty to find the Socage Tenure.

Ibid. T. R. 34 E. 1. De auxilio concesso ad militiam filii Regis.

Ibid. Hill. 4 H. 4. Rot. 19. de rationabili auxilio de Will. Domino Roos, for the marriage of Blanch the Kings eldest Daughter, out of the Mannor of Wragby in the County of Lincoln: The like M. Rot. 5 H. 4. Rot. 33. Lincoln. and Rot. 34. Lincoln. and Rot. 35. Lincoln. and Tr. R. 5 H. 4. Rot. 2. Kanc. and Rot. 3. Kanc. and Rot. 5. Kanc.

See ibid. P. R. 21 E. 3. Rot. Cantab. de auxilio ad filium Regis primogenitum milit. faciend. per Episcopum Elienſem: by which it appeareth, that a Bishop for his Lands which he holdeth by Knights service, or Socage, shall pay Ayd: but those who hold by Frankalmoign, or by Divine service, shall not pay Ayd, as before is said.

See ibid. 20 E. 3. Rot. 13, and 14. de auxiliando ad primogenitum filium Regis militem faciend. and Collectors thereupon appointed. By all which before cited, it appeareth, that Tenure in Burgage is subject to the payment of Ayd. And note, that a great part of London was Abby or Chauntry Land, and the Lands of persons attainted: and all those which are immediately holden of the King by Knights service, or in Socage, shall be contributary to the payment of Ayd, &c.

XI. Hill. 6 Jacobi Regis. Prohibitions.

UPon Wednesday, being Ashwednesday, the day of February, 1606. A great Complaint was made by the President of York unto the King, That the Judges of the Common Law had, in contempt of the Command of the King the last Term, granted sixty or fifty Prohibitions at the least out of the Common-Pleas to the President and Council of York after the sixth day of February, and named there in particular, (scil.) one between Bell and Thawptes, another between Snell and Huet, and another in an Information of a Riotous Rescue preferred by English Bill by the Attorny General against Christopher Dickenson, one of the Sheriffs of York, and divers others, in rescuing of one William Watson out of the Custody of the Deputy of one of the Pursuivants of the same Council who had arrested the said Watson by force of a Commission of Rebellion awarded by the President and Council, which Prohibition in the said Information was (as was affirmed) denyed upon a motion made in the Kings Bench the last Term, and yet granted by us. And the King sent for me to answer to that Complaint: and I onely, all the rest of the Justices being absent, waited upon the King in the Chamber near the Gallery; Who, in the presence of Egerton Lord Chancellor, the Earl of Salisbury Lord Treasurer, the Lord of Northampton Lord Privy Seal, the Earl of Suffolk Lord Chamberlain, the Earl of Worcester, the Archbishop of Canterbury, the Lord Wotton, and others of his Council, rehearsed to me the Complaint aforesaid: and I perceived well, that upon the said

said Information he had conceived great displeasure against the Judges of the Common Pleas, and chiefly against me; To which I (having the Copy of the Complaint sent to me by the Lord Treasurer the Sabbath day before) answered in this manner, That I had, with as much brevity as the time would permit, made search in the Offices of the Prejgnothories of the Common Pleas; and as to the said Cases between Bell and Thawptes, and Snell and Huet, no such could be found: but my intent was not to take advantage of a Misprisal: and the truth was, that the sixth day of February the Court of Common Pleas had granted a Prohibition to the President and Council of York, between Lock Plaintiff, and Bell and others Defendants: and that was, a Replevin in English was granted by the said President and Council, which I affirmed was utterly against Law: For at the Common Law no Replevin ought to be made, but by Original Writ directed to the Sheriff. And the Statute of Marlbridge cap. 21. and West. 1. cap. 17. hath authorized the Sheriff upon Plaint made to him, to make a Replevin; and all that appeareth by the said Statutes, and by the Books of 29 E. 3. 21. 8 Eliz. Dyer 245. And the King neither by his Instructions had made the President and Council Sheriffs, nor could grant to them power to make a Replevin against the Law, nor against the said Acts of Parliament; but the same ought to be made by the Sheriff. And all that was affirmed by the Lord Chancellor for very good Law: And I say, that it might well be that we have granted other Prohibitions in other Cases of English Replevins. Another Prohibition I confesse we have granted between Sir Bethel Knight, now Sheriff of the County of York, as Executor to one Stephenson, who had made him and another his Executors, and preferred an English Bill against Chambers, and divers others in the nature of an Action upon the Case, upon a Trover and Conversion in the life of the Testator of goods and Chattels, to the value of 1000 l. and because the other Executor would not joyn with him, although he was named in the Bill, he had not any remedy at the Common Law, he prayed remedy there in Equity: and I say, that the President and Council have not any authority to proceed in that Case, for divers causes.

1. Because there is an expresse limitation in their Commission, that they shall not hold plea between party and party, &c. unless both parties, or one of them, ranta paupertate sunt gravati, that they cannot sue at the Common Law: and in that Case the Plaintiff was a Knight, and Sheriff, and a man of great ability.

2. By that Suit the King was deceived of his Fine, for he ought to have had 200 l. Fine, because that the damages amounted to 4000 l. and that was one of the causes that the Sheriff began his Suit there, and not at the Common Law: another cause was, that their Decrees which the take upon them are final and uncontroulable, either by Error, or any other remedy. And yet the President is a Noble-man, but not learned in the Law; and those which are of the Council there, although that they have the countenance of Law, yet they are not learned in the Law; and nevertheless they take upon them finall and uncontroulable Decrees in matters of great importance: For if they may deny Relief to any at their pleasure without controulment, so they may do it by their final Decrees without Error, Appeal, or other remedy: which is not so in the Kings Courts where there are five Judges; for they can deny Justice to none who hath Right, nor give any Judgment, but the same is controulable by a Writ of Error, &c.

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And if we shall not grant Prohibitions in Cases where they hold Plea without authority, then the Subjects shall be wrongfully oppressed without Law, and we denied to do them Justice: And their ignorance in the Law appeared by their allowance of that Suit, scil. That the one Executor had no remedy by the Common Law, because the other would not joyn in suit with him at the Common Law: whereas every one learned in the Law knoweth, that summons and severance lyeth in any Suit brought as Executors: and this also in that particular Case was affirmed by the Lord Chancellor; and he much inveighed against Actions brought there upon Trover and Conversion, and said, that they could not be found in our ancient Books.

Another Prohibition I confesse we have granted, between L. Wharton, who by English Bill sued before the Council, Banks, Buttermere, and others, for fishing in his several Fishings in Darwent in the County of C. in the nature of an Action of Trespasse at the Common Law, to his damage of 200 l. And for the causes next before recited, and because the same was meerly determinable at the Common Law, we granted a Prohibition, and that also was allowed by the Lord Chancellor. And as to the Case of Information upon the Riotous Rescous, I having forgotten to speak to that, the King himself asked what the Case was? to whom I answered, that the Case was, That one exhibited a Bill there in the nature of an Action of Debt, upon a Mutuatus against Watson, who upon his Oath affirmed, that he had satisfied the Plaintiff, and that he owed him nothing, and yet because the Defendant did not deny the Debt, the Council decreed the same against him, and upon that Decree the Pursuivant was sent to arrest the said Watson, who arrested him, upon which the Rescous was made: and because that the Suit was in the nature of an Action of Debt upon a Mutuatus at the Common Law, and the Defendant at the Common Law might have waged his Law, of which the Defendant ought not to be barred by that English Bill, quia beneficium juris nemini est auferendum: the Prohibition was granted; and that was affirmed also by the Lord Chancellor: whereupon I concluded, that if the principal cause doth not belong unto them, all their proceedings was coram non Judice, and then no rescous could be done: but the Lord Chancellor said, that though the same cannot be a Rescous, yet it was a Riot, which might be punished there: which I denied, unlesse it were by course of Law by force of a Commission of Oyer and Terminer, and not by an English Bill: but to give the King full satisfaction in that point, the truth is, the said Case was debated in Court, and the Court inclined to grant a Prohibition in the said case; but the same was stayed to be better advised upon, so as no Prohibition was ever under Seal in the said Case.

Also I confesse, that we have granted divers Prohibitions to stay Suits there by English Bill upon penal Statutes: for the manner of prosecution, as well for the Action, Process, &c. as for the Count, is to be pursued, and cannot be altered, and therefore without question the Council in such cases cannot hold Plea, which was also affirmed by the Lord Chancellor. And I said, that it was resolved in the Reign of Queen Eliz. in Parots Case, and now lately in the Case of the President and Council of Wales, That no Court of Equity can be erected at this day without Act of Parliament, for the reasons and causes in the Report of the said Case of Parot.

And the King was well satisfied with these reasons and causes of

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our proceedings, who of his Grace gave me his Royall hand, and I departed from thence in his favour. And the surmise of the Number, and that the Prohibition in the said Case in the Information was denied in the Kings Bench, was utterly denied: for the same was moved when two Judges were in Court, who gave not any opinion therein, but required Serjeant Hutton who moved it, to move the same again when the Court was full, &c.

XII. Pasch. 7 Jacobi Regis.

NOte, that this Term a Question was moved at Serjeants-Inn: Who by the Common Law ought to repair the Bridges, common Rivers, and Sewers, and the High-wales, and by what means they shall be compelled to it; and first of the Bridges: And as to them it is to be known, That of common Right all the Country shall be charged to the Reparation of a Bridge, and therewith agreeth 10 E. 3. 28. b. That a Bridge shall be levied by the whole Country, because it is a common Easement for the whole Country, and as to that Point, the Statute of 22 H. 8. cap. 5. was but an affirmance of the Common Law: And this is true, when no other is bound by the Law to repair it, but he who hath the Toll of the men or Cattell which pass over a Bridge or Causey, ought to repair the same, for he hath the Toll to that purpose, Et qui sentit commodum sentire debet & onus: and therewith agrees 14 E. 3. Barr 276. Also a man may be bounden to repair a Bridge, ratione Tenuræ of certain Land, But a particular person cannot be bound by prescription, scil. That he and all his Ancestors have repaired the Bridge, if it be not in respect of the Tenure of his Land, taking of Toll, or other profit; for the Act of the Ancestor cannot charge the Heir without profit. But an Abbot or other Corporation who hath a lawfull being may be charged, scil. That he and his Predecessors time out of mind, &c. have repaired the Bridge; For the Abbot and Covent may bind their Successors, vide 21 E. 4. 28. 27 E. 3. 8. 22 Ass. 8. 5 H. 7. 3. And if an Abbot and his Predecessors time out of mind have repaired a Bridge of Almes, they shall be compelled to repair it; and therewith agreeth 10 E. 3. 28. So it is of a High-way of common Right, all the Country ought for to repair it, because that the Country have their ease and passage by it, which stands with the reason of the Case of the Bridge, but yet some may be particularly bounden to repair it as is aforesaid. He who hath the Land adjoyning, ought of common Right without prescription to scour and cleanse the Ditches, next to the way to his Land: and therewith agreeth the Book of 8 H. 7. 5. But he who hath Land adjoyning without prescription, is not bound to repair the way. So of a common River, of common Right all who have ease and passage by it, ought to cleanse and scour it; For a common River is as a common Street, as it is said in 22 Ass. and 37 Ass. 10. But he who hath Land adjoyning to the River is not bounden to cleanse the River, unless he hath the benefit of it, scil. a Toll, or a Fishing, or other profit. See 37 Ass. p. 10.

XIII. Pasch. 7 Jacobi.

Sir William Reades and Boothes Case.

IN the great Case in the Star-Chamber, of a Forgery, between Sir William Read Plaintiff, and Roger Booth, and Cuthert Booth, and others Defendants: the Case was this;

The said Roger Booth 38 Eliz. was convicted in that Court of the publication of a Writing under Seal, forged in the name of Sir Thomas Gresham, of a Rent-charge of a hundred pounds, out of all his Lands and Tenements, to one Markham for ninety nine years, bearing date the one and twentieth year of Queen Elizabeth; the said Roger knowing it to be forged. And afterwards the said Sir William Reade exhibited the said Bill against the said Boothes, and others, for forging of another writing under Seal bearing date the twentieth of Eliz. in the name of the said Sir Thomas Gresham, purporting a Deed of Feoffment of all his Lands (except certain) to Sir Rowland Heyward and Edward Hoogon and their Heirs, to certain uses, which was in effect to the use of Markham the younger and his Heirs: And for the publication of the said Writing, knowing the same to be forged, was the Bill exhibited. And now upon the hearing of the Cause in the Star-Chamber this Term, these doubts were moved upon the Statute of 5 Eliz. 1. If one who is convicted of publication of a Deed of Feoffment or Rent-charge, knowing the same to be forged, again at another day forge another Deed of Feoffment, or Rent-Charge, if he be within the case of Felony within the said Act, (which doubt ariseth upon these words (etsoons) committed again any of the said Offences) And therefore it was objected, that he ought to commit again the same nature of Offence, scil. If he were convicted of Forgery he ought to forge again, and not onely publish, knowing, &c. And if first he were convicted of publishing, knowing, &c. he ought to offend again in publication, knowing, &c. and not in Forgery, for (etsoons) which is (iterum) implyeth that it ought to be of the same nature of Offence. The second doubt was, If a man committed two Forgeries, the one in 37 of Eliz. and the other in 38. and he is first convicted of the last, if he may be now impeached for the first. The third doubt was, when Roger Booth was convicted in 38 Eliz. and afterwards is charged with a new Forgery in 37 Eliz. If the Witnesses proving in truth that it was forged after the first conviction, if the Star-Chamber hath Jurisdiction of it. The last doubt was, when Cuthert Booth who never was convicted of Forgery before, if in truth the Forgery was done, and so proved in 38 Eliz. if he might be convicted upon this Bill, because that the Forgery is alledged before that it was done. As to the first and second doubts, it was resolved by the two chief Justices and the chief Baron, that if any one be convicted of Forgery or publication of any Writing concerning Freehold, &c. within the first Branch; or concerning Interest or Term for years, &c. within the second Branch, and be convicted, if afterwards he offend either against the first Branch or second, that the same is Felony: As if he Forgeth a Writing concerning interest for years within the second branch, and be convicted, and afterwards he forgeth a Charter of Feoffment within the first branch, or è converso,

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that that is Felony, and that by expresse words of the Act: That if any person or persons being hereafter convicted or condemned of any of the said Offences, (which words, any of the said Offences, extend to all the Offences mentioned before, either in the first branch, or in the second branch) by any the wales or means above limited, shall after any such conviction or condemnation, eftsoons commit or perpetrate any of the said Offences, in form aforesaid, which words, Any of the said Offences, &c. do extend to the nature of all the Offences mentioned in the first and second Branches: But if one forge a Writing in 37. of Eliz. and afterwards he forge another in 38. of Eliz. yet it is not Felony, although that he forgeth many Writings one after the other, for by the expresse words of the Act, it is not Felony. The Forgery, &c. which is Felony by the Act, ought to be after conviction or condemnation of a former Writing. As to the third doubt, it was resolved, That the allegation of the time by the Plaintiff in the Bill, shall not alter the Offence, but shall give unto the Court Jurisdiction: but if it appeareth to the Court, that the Forgery or Publication was after the Sentence, then the Court shall surcease. As to the last Point, it was resolved, that the time of the Forgery is not materiall, be it before or after the Offence in truth committed, if it be committed before the exhibiting of the Bill; but if the date of the Writing supposed to be forged, had been mistaken, there the Defendant could not be condemned of a Deed of another date, for that is not the Offence complained of in the Bill, of which the Court can give Sentence.

XIV. Pasch. 7 Jacobi Regis.

The Case of Sewers.

10 rep. 137. b. in Case.

The Case was, That there was a Cawsey, or Mill-stank of Stone in the River of Dee and City of Chester, which Cawsey before the Raign of King Edward the first, was erected for the necessary maintenance of certain Mills, some of the Kings, and others of the Subjects at the end of the said Causey: and now a certain Decree was made by certain Commissioners of Sewers, for a breach to be made by ten Poles in length in the said Cawsey, which Cawsey as it was admitted by both parties was erected before the Raign of King Edward the first, and so hath continued untill this day without any exaltation or inhansing: and if by any Decree of the Commissioners by force of any Statute, any breach may be made in that Cawsey, was the Question. And it was referred by the Letters of the Lords of the Privy Councell, to the two chief Justices, and the chief Baron; and upon hearing of Councell learned at divers dates, and good consideration had in the time of the last Vacation, of all the Statutes concerning Sewers, and upon conference had among themselves, it was resolved as followeth.

1. Whereas it is provided by the Statute of Magna Charta, cap. 23. Quod omnes Kidelli deponantur de cætero per Thamesiam, & Medewei-am & per totam Angl. nisi per Costeram Maris. It was resolved, That that Stat. extended only to Kidells, sc. open Wears for taking of Fish; but the first Statute which extended to pulling down, or abating of any Mills, Mill-stankes, and Causeys, was the Statute of 25 E. 3. cap. 4. which Act appointed such only to be thrown down or abated, which were levied or erected in the Raign of King Edward the first, or after:

But by the Statute made An. 1 H. 4. cap. 12. upon complaint in Parliament of the great damages which have risen by the outrageous inhansing of Mills, Mill-stanks, and other impediments made and erected before the Raign of King Edward the first: The said old Mills and Mill-stanks were appointed by Act then made to be surveyed, and such as were found to be much inhansed to be corrected and amended; saving alwaies reasonable substance of such Mills, Mill-stanks, Wears, &c. so in old time made and levied: None of which Acts extended to the Case in question; For that Cawsey was erected before the Raign of Edward the first, and never exalted or inhansed after the erection of it: And the Statute of 12 H. 4. cap. 7. doth confirm all the said Acts; and by them the generality of the Act of Magna Charta is restrained, as by the said Acts appeareth. And by the statute of 23 H. 8. cap. 5. None of the said Acts as to the Case in question is repealed; for first, the same Act appoints the manner, form, tenor, and effect of the Commission of Sewers, by which power is given to the Commissioners to survey Walls, &c. Fences, Cawseys, &c. Mills, &c. and then to correct, repair, amend, pull down or overthrow, or reform, as cause requireth, according to their wisdomes and discretions; and therein as well to ordain and do after the form, tenor, and effect of all and singular the Statutes and Ordinances made before the first of March, in the twenty third year of Henry the eighth, as also to inquire by the Oathes of honest and lawfull men, &c. through whose default the said hurts and damages have happened, &c. By which it appeareth, That the discretion of the Commissioners was limited, scil. to proceed according to the statutes and Ordinances before made, &c. And also to reform, repair, and amend the said Walls, &c. by force of that word (said) hath relation to the precedent purview of the Act, &c. And further to reform, prostrate and overthrow all such Mills, &c. and other impediments and annoyances (aforesaid) as shall be found by Inquisition, or by your survey and discretion to be excessive, i. e. hurtfull; which word (aforesaid) refers that clause also to the precedent purview, scil. such impediments and annoyances as are against the Statutes and Ordinances before made. Also it is further provided by the same Act, That all and every Statute, Act, and Ordinance heretofore made concerning the Premisses or any of them, not being contrary to this present Act, nor heretofore repealed, shall from henceforth stand and be good and effectuall for ever. But the said Acts of 25 E. 3. and 1 H. 4. are not contrary to any clause of that Act, nor were repealed before: And alwaies such construction ought to be made, that one part of the Act may agree with another, and all to stand together: and if they had intended a repeal of the said former Acts, they would not have repealed them by such generall and doubtfull words, when they concerned the Inheritances of many Subiects: and according to this resolution we certified the Lords of the Councell, that the said Statutes of 25 E. 3. and 1. of H. 4. remained yet in force; and that the Authority given by the Commission of Sewers, did not extend to Mills, Mill-stanks, Cawseys, &c. erected before the Raign of King Ed. 1. unless that they have been inhansed and exalted above their former height, and thereby made more prejudiciall, &c. In which case they are not to be overthrown or subverted, but to be reformed by abating the excesse and inhaunsment only.

Trinit.

Trinit. 7 Jacobi Regis.

XIV. The Case De Modo Decimandi, and of Prohibitions, debated before the Kings Majesty.

RIchard, Archbishop of Canterbury, accompanyed with the Bishop of London, the Bishop of Bathe and Wells, the Bishop of Rochester, and divers Doctors of the Civil and Canon Law, as Dr. Dunn, Judge of the Arches, Dr. Bennet Judge of the Prerogative. Dr. James, Dr. Martin, and divers other Doctors of the Civil and Canon Law came attending upon them to the King to Whitehall the Thursday, Friday, and Saturday after Easter-Term, in the Councell-Chamber; where the Chief Justice, and I my self, Daniel Judg of the Common-Pleas, and Williams Judg of the Kings-Bench, by the command of the King attended also: where the King being assisted with his Privy Councel, all sitting at the Councel Table, spake as a most gracious, good, and excellent Soveraign, to this effect: As I would not suffer any novelty or Innovations in my Courts of Justice Ecclesiastical and Temporal; so I will not have any of the Laws, which have had judicial allowances in the times of the Kings of England before me, to be forgotten, but to be put in execution. And for as much as upon the contentions between the Ecclesiastical and Temporal Courts great trouble, inconvenience and loss may arise to the subjects of both parts, namely when the controversie ariseth upon the jurisdiction of my Courts of ordinary Justice; and because I am the head of Justice immediately under God, and knowing what hurt may grow to my Subjects of both sides, when no private case, but when the Jurisdictions of my Courts are drawn in question, which in effect concerneth all my Subjects, I thought that it stood with the Office of a King, which God hath committed to me, to hear the controversies between the Bishops and other of his Clergy, and the Judges of the Laws of England, and to take Order, that for the good and quiet of his Subjects, that the one do not encroach upon the other, but that every of them hold themselves within their natural and local jurisdiction, without encroachment or usurpation the one upon the other. And he said, that the onely question then to be disputed was, If a Parson, or a Vicar of a Parish, sueth one of his Parish in the Spiritual Court for Tythes in kind, or Lay-fee, and the Defendent alledgeth a custom or prescription, De modo Decimandi, if that custom or prescription, De modo Decimandi, shall be tryed and determined before the Judg Ecclesiastical where the Suit is begun; or a Prohibition lyeth, to try the same by the common Law. And the King directed, that we who were Judges should declare the reasons and causes of our proceedings, and that he would hear the authorities in the Law which we had to warrant our proceedings in granting of Prohibition in cases of Modo Decimandi. But the Archbishop of Canterbury knæled before the King, and desired him, that he would hear him and others who are provided to speak in the case for the good of the Church of England: and the Archbishop himself inveighed much against two things: 1. That a Modus Decimandi should be

tryed

tryed by a Jury, because that they themselves claim more or less modum Decimandi; so as in effect they were Tryors in their own cause, or in the like cases. 2. He inveighed much the præcipate and hasty Tryals by Juries: and after him Doctor Bennet, Judg of the Prerogative Court, made a large Invection against Prohibitions in Causis Ecclesiasticis: and that both Jurisdictions as well Ecclesiastical as Temporal were derived from the King; and all that which he spake out of the Book which Dr. Ridley hath lately published, I omit as impertinent: and he made five Reasons, why they should try Modum Decimandi.

And the first and principal Reason was out of the Register, fo. 58. quia non est consonans rationi, quod cognitio accessarii in Curia Christianitatis impediatur ubi cognitio Causæ principalis ad forum Ecclesiasticum noscitur pertinere. And the principal cause is Right of Tythes, and the Plea of Modo Decimandi sounds in satisfaction of Tythes; and therefore the Conusance of the original cause, (scil.) the Right of Tythes appertaining to them, the Conusance of the bar of Tythes, which he said was but the accessary, and as it were dependant upon it, appertained also to them. And whereas it is said in the Bishop of Winchesters Case, in the second part of my Reports, and 8 E. 4. 14. that they would not accept of any Plea in discharge of Tythes in the Spiritual Court, he said, that they would allow such Pleas in the Spiritual Court, and commonly had allowed them; and therefore he said, that that was the Mystery of iniquity founded upon a false and feigned foundation, and humbly desired the reformation of that Error, for they would allow Modum Decimandi being duly proved before them.

2. There was great inconvenience, that Lay-men should be Tryers of their own Customs, if a Modus Decimandi should be tryed by Jurors; for they shall be upon the matter Jurors in their own cause.

3. That the custom De modo Decimandi is of Ecclesiastical Jurisdiction and Conusance, for it is a manner of Tything, and all manner of Tything belongs to Ecclesiastical Jurisdiction: and therefore he said, that the Judges, in their Answer to certain Objections made by the Archbishop of Canterbury, have confessed, that suit may be had in Spiritual Courts pro modo Decimandi; and therefore the same is of Ecclesiastical Conusance; and by consequence it shall be tryed before the Ecclesiastical Judges: for if the Right of Tythes be of Ecclesiastical Conusance, and the satisfaction also for them of the same Jurisdiction, the same shall be tryed in the Ecclesiastical Court.

4. In the Prohibitions of Modus Decimandi averment is taken, That although the Plaintiff in the Prohibition offereth to prove Modum Decimandi, the Ecclesiastical Court doth refuse to allow of it, which was confessed to be a good cause of Prohibition: But he said, they would allow the Plea De Modo Decimandi in the Spiritual Court, and therefore cessante causa cessabit & effectus, and no Prohibition shall lie in the Case.

5. He said, that he can shew many consultations granted in the cause De modo Decimandi, and a Consultation is of greater force than a Prohibition; for Consultation, as the word imports, is made with the Court with consultation and deliberation. And Bacon, Solicitor-General, being (as it is said) assigned with the Clergy by the King, argued before the King, and in effect said less than Doctor Bennet said before: but he touched 1 R. 3. 4. the Opinion of Hussey, when the Original ought to begin in the Spiritual Court, and afterwards a

thing

thing cometh in issue which is tryable in our Law, yet it shall be tryed by their Law: As if a man sueth for a Horse devised to him, and the Defendant saith, that the Devisor gave to him the said Horse, the same shall be tryed there. And the Register 57 and 58. If a man be condemned in Expenses in the Spiritual Court for laying violent hands upon a Clark, and afterwards the Defendant pays the costs, and gets an Acquittance, and yet the Plaintiff sueth him against his Acquittance for the Costs, and he obtains a Prohibition, for that Acquittances and Deeds are to be determined in our Law, he shall have a Consultation, because that the principal belongeth to them. 38 E. 3. 5. Right of Tythes between two spiritual persons shall be determined in the Ecclesiastical Court. And 38 E. 3. 6. where the Right of Tythes comes in debate between two spiritual persons, the one claiming the Tythes as of common Right within his Parish, and the other claiming to be discharged by real composition, the Ecclesiastical Court shall have Jurisdiction of it.

And the said Judges made humble suit to the King, That for as much as they perceived that the King in his Princely Wisedom did detest Innovations and Novelties, that he would vouchsafe to suffer them with his gracious favor, to inform him of one Innovation and Novelty which they conceived would tend to the hinderance of the good administration and execution of Justice within his Realm.

Your Majesty, for the great zeal which you have to Justice, and for the due administration thereof, hath constituted and made fourteen Judges, to whom you have committed not onely the administration of Ordinary Justice of the Realm, but crimina læsæ Majestatis, touching your Royal person, for the legal proceeding: also in Parliament we are called by Writ, to give to your Majesty and to the Lords of the Parliament our advice and counsel, when we are required: We two chief Justices sit in the Star-Chamber, and are oftentimes called into the Chancery, Court of Wards, and other High Courts of Justice: we in our Circuits do visit twice in the year your Realm, and execute Justice according to your Laws: and if we who are your publique Judges receive any diminution of such reverence and respect in our places, which our predecessors had, we shall not be able to do you such acceptable service as they did, without having such reverence and respect as Judges ought to have. The state of this Question is not in statu deliberativo, but in statu judiciali; it is not disputed de bono, but de vero, non de Lege fienda, sed de Lege lata; not to frame or devise new Laws, but to inform your Majesty what your Law of England is: and therefore it was never seen before, that when the Question is of the Law, that your Judges of the Law have been made disputants with him who is inferior to them, who day by day plead before them at their several Courts at Westminster: and although we are not afraid to dispute with Mr. Bennet and Mr. Bacon, yet this example being primæ impressionis, and your Majesty detesting Novelties and innovations, we leave it to your Grace and Princely consideration, whether your Majesty will permit our answering in hoc statu judiciali, upon your publique Judges of the Realm? But in Obedience to your Majesties command, We, with your Majesties gracious favor, in most humble manner will inform your Majesty touching the said Question, which we, and our predecessors before us, have oftentimes adjudged upon judicial proceedings in your Courts of Justice at Westminster: which Judgments cannot be reversed or examined for any Error in Law, if

not

not by a Writ of Error in a more high and supream Court of Justice, upon legal and judicial proceedings: and that is the ancient Law of England, as appeareth by the Statute of 4 H. 4. cap. 22.

And we being commanded to proceed, all that which was said by us, the Judges, was to this effect, That the Tryall De Modo Decimandi ought to be by the Common Law by a Jury of twelve men, it appeareth in three manners: First, by the Common Law: Secondly, by Acts of Parliament: And lastly, by infinite judgments and judicial proceedings long times past without any impeachment or interruption.

But first it is to see, What is a Modus Decimandi? Modus Decimandi is, when Lands, Tenements, or Hereditaments have been given to the Parson and his successors, or an annual certain sum, or other profit, always, time out of minde, to the Parson and his successors, in full satisfaction and discharge of all the Tythes in kinde in such a place: and such manner of Tything is now confessed by the other party to be a good bar of Tythes in kinde.

I. That Modus Decimandi shall be tryed by the Common Law, that is, that all satisfactions given in discharge of Tythes, shall be tryed by the Common Law: and therefore put that which is the most common case, That the Lord of the Mannor of Dale prescribes to give to the Parson 40 s. yearly, in full satisfaction and discharge of all Tythes growing and renewing within the Mannor of Dale, at the Feast of Easter: The Parson sueth the Lord of the Mannor of Dale for his Tythes of his Mannor in kind, and he in Bar prescribes in manner ut supra: The Question is, if the Lord of the Mannor of Dale may upon that have a Prohibition, for if the Prohibition lyeth, then the Spiritual Court ought not to try it; for the end of the Prohibition is, That they do not try that which belongs to the Tryal of the Common Law; the words of the Prohibition being, that they would draw the same ad aliud examen.

First, the Law of England is divided into Common-Law, Statute-Law, and Customs of England: and therefore the Customs of England are to be tryed by the Tryal which the Law of England doth appoint.

Secondly, Prescriptions by the Law of the Holy Church, and by the Common Law, differ in the times of limitation; and therefore Prescriptions and Customs of England shall be tryed by the Common Law. See 20 H. 6. fo. 17. 19 E. 3. Jurisdiction 28. The Bishop of Winchester brought a Writ of Annuity against the Archdeacon of Surry, and declared, how that he and his successors were seised by the hands of the Defendant by title of Prescription, and the Defendant demanded Judgment, if the Court would hold Jurisdiction being between spiritual persons, &c. Stone Justice, Be assured, that upon title of prescription we will here hold Jurisdiction; and upon that, Wilby chief Justice gave the Rule, Answer: Upon which it follows, that if a Modus Decimandi, which is an annual sum for Tythes by prescription, comes in debate between spiritual persons, that the same shall be tryed here: For the Rule of the Book is general, (scil.) upon title of prescription, we will hold Jurisdiction, and that is fortified with an Asseveration, Know assuredly; as if he should say, that it is so certain, that it is without question. 32 E. 3. Jurisd. 26. There was a Vicar who had onely Tythes and Oblations, and an Abbot claimed an Annuity or Pension of him by prescription: and it was adjudged, that the same prescrip-

prescription, although it was betwixt spiritual persons, should by tryed by the Common Law: Vide 22 H. 6. 46. and 47. A prescription, that an Abby time out of minde had found a Chaplain in his Chappel to say Divine Service, and to minister Sacraments, tryed at the Common Law.

3. See the Record of 25 H. 3. cited in the case of Modus Decimandi before: and see Register fo. 38. when Lands are given in satisfaction and discharge of Tythes.

4. See the Statute of Circumspecte agatis, Decimæ debitæ, seu consuetæ, which proves that Tythes in kind, and a Modus by custom, &c.

5. 8 E. 4. 14. and Fitz. N. B. 41. g. A Prohibition lieth for Lands given in discharge of Tythes. 28 E. 3. 97. a. There Suit was for Tythes, and a Prohibition lieth, and so abridged by the Book, which of necessity ought to be upon matter De Modo Decimandi, or discharge.

6. 7 E. 6. 79. If Tythes are sold for mony, by the sale the things spiritual are made temporal, and so in the case De modo Decimandi, 42 E. 3. 12. agrees.

7. 22 E. 3. 2. Because an Appropriation is mixt with the Temporalty, (scil.) the Kings Letters Patents, the same ought to be shewed how, &c. otherwise of that which is meer Temporal: and so it is of real composition, in which the Patron ought to joyn: Vide 11 H. 4. 85. Composition by writing, that the one shall have the Tythes, and the other shall have mony, the Suit shall be at the Common Law.

Secondly, By Acts of Parliament.

1. The said Act of Circumspecte agatis, which giveth power to the Ecclesiastical Judg to sue for Tythes due first in kinde, or by custom, i. e. Modus Decimandi: so as by authority of that Act, although that the yearly sum foundeth in the Temporalty, which was payd by Custom in discharge of Tythes, yet because the same cometh in the place of Tythes, and by constitution, the Tythes are changed into mony, and the Parson hath not any remedy for the same, which is the Modus Decimandi at the Common Law; for that cause the Act is clear, that the same was a doubt at the Common Law: And the Statute of Articuli Cleri, cap. 1. If corporal penance be changed in pœnam pecuniariam, for that pain Suit lieth in the Spiritual Court: For see Mich. 8 H. 3. Rot. 6. in Thesaur. A Prohibition lieth pro eo quod Rector de Chesterton exigit de Hugone de Logis de certa portione pro Decimis Molendinarum; so as it appeareth, it was a doubt before the said Statute, if Suit lay in the Spiritual Court de Modo Decimandi. And by the Statute of 27 H. 8. cap. 20. it is provided and enacted, That every of the subjects of this Realm, according to the Ecclesiastical Laws of the Church, and after the laudable usages and customs of the Parish, &c. shall yield and pay his Tythes, Offerings, and other duties: and that for subtraction of any of the said Tythes, offerings, or other duties, the Parson, &c. may by due Process of the Kings Ecclesiasticall Laws, convent the person offending before a competent Judg, having authority to hear and determine the Right of Tythes, and also to compel him to yield the Duties, i. e. as well Modus Decimandi, by laudable usage or Custom of the Parish, as Tythes in kind: and with that in effect agrees the Statute of 32 H. 8. cap. 7. By the Statute of 2 E. 3. cap. 13. it is enacted, That every of the Kings Subjects shall from hence forth, truly and justly, without fraud or guile, divide, &c. and pay all manner of their predial Tythes in their proper kind, as they rise

and happen in such manner and form as they have been of right yielded and payd within forty years next before the making of this Act, or of right and Custom ought to have been payd. And after in the same Act there is this clause and Proviso, Provided always, and be it enacted, That no person shall be sued, or otherwise compelled to yield, give, or pay any manner of Tythes for any Mannors, Lands, Tenements, or Hereditaments, which by the Laws and Statutes of this Realm, or by any priviledg or prescription, are not chargeable with the payment of any such Tythes, or that be discharged by any compositions real. And afterwards, there is another Branch in the said Act; And be it further enacted, That if any person do substract or withdraw any manner of Tythes, Obventions, Profits, Commodities, or other Duties before mentioned (which extends to Custom of Tything, i. e. Modus Decimandi, mentioned before in the Act, &c.) that then the party so substracting, &c. may be convented and sued in the Kings Ecclesiastical Court, &c. And upon the said Branch, which is in the Negative, That no person shall be sued for any Tythes of any Lands which are not chargeable with the payment of such Tythes by any Law, Statute, Priviledg, Prescription, or Real Composition. And always when an Act of Parliament commands or prohibits any Court, be it Temporal or Spiritual, to do any thing temporal or spiritual, if the Statute be not obeyed, a Prohibition lieth: as upon the Statute de articulis super Cartas, ca. 4. Quod communia Placita non tenentur in Scaccario: a Prohibition lieth to the Court of Exchequer, if the Barons hold a Common-Plea there, as appeareth in the Register 187. b. So upon the Statute of West. 2. Quod inquisitiones quæ magnæ sunt examinationis non capiantur in patria; a Prohibition lieth to the Justices of Nisi Prius. So upon the Statute of Articuli super Cartas, cap. 7. Quod Constabularius Castr. Dover, non teneat Placitum forinsecum quod non tangit Custodiam Castri, Register 185. So upon the same Statute, cap. 3. Quod Senescallus & Marischallus non teneant Placita de libero tenemento, de debito, conventione, &c. a Prohibition lieth, 185. And yet by none of these Statutes, is any Prohibition or supersedeas given by express words of the Statute. So upon the Statutes 13 R. 2. cap. 3. 15 R. 2. cap. 2. 2 H. 4. cap. 11. by which it is provided, That Admirals do not meddle with any thing done within the Realm, but onely with things done upon the Seas, &c. a Prohibition lieth to the Court of Admiralty. So upon the Statute of West. 2. cap. 43. against Hospitalers and Templers, if they do against the same Statute, Regist. 39. a. So upon the Statute de prohibitione regia, Ne laici ad citationem Episcopi conveniant ad recognitionem faciend. vel Sacrament. præstanda nisi in casibus matrimonialibus & Testamentariis, a Prohibition lieth. Regist. 36. b. And so upon the Statute of 2 H. 5. cap. 3. at what time the Libel is grantable by the Law, that it be granted and delibered to the party without difficulty, if the Ecclesiastical Judg, when the cause which depends before him is meer Ecclesiastial, denieth the Libel, a Prohibition lieth, because that he doth against the Statute; and yet no Prohibition by any express words is given by the Statute. And upon the same Statute the Case was in 4 E. 4. 37. Pierce Peckam took Letters of Administration of the Goods of Rose Brown of the Bishop of London, and afterwards T. T. sued to Thomas Archbishop of Canterbury, That because the said Rose Brown had Goods within his Dioces, he prayed Letters of Administration to be committed to him, upon which the Bishop granted him Letters of Administration, and afterwards

See Lib. Entr. 450. a Prohibition was upon the Statute that one shall not maintain; and so upon every penal Law.

See F.N.B. 39. b. Prohibition to the Common Pleas upon the Stat. of Magna Charta that they do not proceed in a Writ of Præcipe in Capite, where the Land is not holden of the King. 1 & 2 Eliz. Dy. 170, 171. Prohibition upon the Statute of barrenes, and pertit is onely prohibited by implication.

wards T. T. libelled in the Spiritual Court of the Archbishop in the Arches against Pierce Peckham, to whom the Bishop of London had committed Letters of Administration to repeal the same: and Pierce Peckham, according to the said Statute, prayed a Copy of the Libel exhibited against him, and could not have it, and thereupon he sued a Prohibition, and upon that an Attachment: And there Catesby Serjeant moved the Court, that a Prohibition did not lie, for two causes: 1. That the Statute gives that the Libel shall be delivered, but doth not say that the Plea in the Spiritual Court shall surcease by Prohibition. 2. The Statute is not intended of matter mer spiritual, as that case is, to try the Prerogative and the Liberty of the Archbishop of Canterbury and the Bishop of London, in committing of Administrations. And there Danby Chief Justice, If you will not deliver the Libel according to the Statute, you do wrong, which wrong is a temporal matter, and punishable at the Common Law; and therefore in this case the Party shall have a special Prohibition out of this Court, reciting the matter, and the Statute aforesaid, commanding them to surcease, until he had the Copy of the Libel delivered unto him: which case is a stronger case than the case at the Bar, for that Statute is in the Affirmative, and the said Act of 2 E. 6. cap. 13. is in the Negative, scil. That no Suit shall be for any Tythes of any Land in kinde where there is Modus Decimandi, for that is the effect of the said Act, as to that point. And always after the said Act, in every Term in the whole Reigns of King E. 6. Queen Mary, and Queen Elizabeth, until this day, Prohibitions have been granted in Causa Modi Decimandi, and Judgments given upon many of them, and all the same without question made to the contrary. And accordingly all the Judges resolved in 7 E. 6. Dyer 79. Et contemporanea expositio est optima & fortissima in lege, & à communi observantia non est recedendum, & minime mutanda sunt quæ certam habuerunt interpretationem.

And as to the first Objection, that the Plea of Modus Decimandi is but accessary to the Right of Tythes; it was resolved, that the same was of no force, for three causes.

1. In this case, admitting that there is Modus Decimandi, then by the Custom, and by the Act of 2 E. 6. and the other Acts, the Tythes in kinde are extinct and discharged; for one and the same Land cannot be subject to two manner of Tythes, but the Modus Decimandi is all the Tythe with which the Land is chargeable: As if a Horse or other thing valuable be given in satisfaction of the Duty, the Duty is extinct and gone: and it shall be intended, that the Modus Decimandi began at the first by real composition, by which the Lands were discharged of the Tythes, and a yearly sum in satisfaction of them assigned to the Parson, &c. So as in this case there is neither Principal nor Accessary, but an Identity of the same thing.

2. The Statute of 2 E. 6. being a Prohibition in it self, and that in the Negative, if the Ecclesiastical Judge doth against it, a Prohibition lyeth, as it appeareth clearly before.

3. Although that the Rule be general, yet it appeareth by the Register it self, that a Modus Decimandi is out of it; for there is a Prohibition in Causa Modi Decimandi, when Lands are given in satisfaction of the Tythes.

As to the second Objection, it was answered and resolved, That that was from, or out of the Question; for Status Quæstionis non est

deliberativus sed judicialis, what was fit and convenient, but what the Law is: and yet it was said, It shall be more inconvenient to have an Ecclesiastical Judge, who is not sworn to do Justice, to give sentence in a case between a man of the Clergy and a Lay-man, than for twelve men sworn to give their Verdict upon hearing of Witnesses viva voce, before an indifferent Judge, who is sworn to do Right and Justice to both parties: But convenient or inconvenient is not the Question: Also they have in the Spiritual Court such infinite exceptions to Witnesses, that it is at the Will of the Judg with which party he shall give his sentence.

As to the third Objection, it was answered and resolved: First, That satisfactio pecuniaria of it self is Temporal: But for as much as the Parson hath not remedy pro Modo Decimandi at the Common Law, the Parson by force of the Acts cited before might sue pro Modo Decimandi in the Ecclesiastical Court: but that doth not prove, That if he sueth for Tythes in kinde, which are utterly extinct, and the Land discharged of them, that upon the Plea de Modo Decimandi, a Prohibition should not lie, for that without all question it appeareth by all that which before hath been said, that a Prohibition doth lie. See also 12 H. 7. 24. b. Where the original cause is the Spiritual, and they proceed upon a Temporal, a Prohibition lyeth. See 39 E. 3. 22 E. 4. Consultation, That Right of Tythes which is meerly Ecclesiastical, yet if the question ariseth of the limits of a Parish, a Prohibition lieth: and this case of the limits of a Parish was granted by the Lord Chancellor, and not denied by the other side.

As to the Objection, that an Aberment is taken of the refusal of the Plea de Modo Decimandi; it was answered and resolved, That the same is of no force for divers causes:

1. It is onely to inforce the contempt.

2. If the Spiritual Court ought to have the Trial de Modo Decimandi, then the refusal of acceptance of such a Plea should give cause of Appeal, and not of Prohibition: as if an Excommunication, Divorce, Heresie, Simony, &c. be pleaded there, and the Plea refused, the same gives no cause of Prohibition: as, if they deny any Plea, meer Spiritual Appeal, and no Prohibition lieth.

3. From the beginning of the Law, no Issue was ever taken upon the refusal of the plea in Causa Modi Decimandi, nor any Consultation ever granted to them, because they did not refuse, but allowed the plea.

4. The refusal is no part of the matter issuable or material in the plea; for the same is no part of the suggestion which onely is the substance of the plea: and therefore the Modus Decimandi is proved by two Witnesses, according to the Statute of 2 E. 6. cap. 13. and not the refusal, which proveth, that the Modus Decimandi is onely the matter of the suggestion, and not the refusal.

5. All the said five matters of Discharge of Tythes, mentioned in the said Branch of the Act of 2 E. 6. being contained within a suggestion, ought to be proved by two Witnesses, and so have been always from the time of the making of the said Act; and therefore the Statute of 2 E. 6. clearly intended, that Prohibitions should be granted in such causes.

6. Although that they would allow bona fide de Modo Decimandi, without refusal, yet if the Parson sueth there for Tythes in kinde, when the Modus is proved, the same being expressly prohibited by the

Act

Act of 2 E. 6. a Prohibition lieth, although the Modus be spiritual, as appeareth by the said Book of 4 E. 4. 37. and other the Cases aforesaid.

And afterwards, in the third day of debate of this case before his gracious Majesty, Dr. Bennet and Dr. Martin had reserved divers consultations granted in Causa Modi Decimandi, thinking that those would make a great impression in the Opinion of the King: and thereupon they said, That Consultations were the Judgments of Courts had upon deliberation, whereas Prohibitions were onely granted upon surmises: And they shewed four Precedents:

One, where three joyntly sued a Prohibition in the Case of Modo Decimandi, and the Consultation saith, Pro eo quod suggestio materiaque in eadem contenta minus sufficiens in Lege existit, &c.

2. Another in Causa Modi Decimandi, to be paid to the Parson or Vicar.

3. Where the Parson sued for Tythes in kinde, and the Defendant alledged Modus Decimandi to be paid to the Vicar.

The fourth, where the Parson libelled for Tythe Wool, and the Defendant alledged a custom, to reap corn, and to make it into sheaves, and to set forth the tenth sheaf at his charges, and likewise of Hay, to sever it from the nine cocks at his charge, in full satisfaction of the Tythes of the Corn, Hay, and Wool.

To which I answered, and humbly desired the Kings Majesty to observe that these have been reserved for the last, and center point of their proof: And by them your Majesty shall observe these things:

1. That the Kings Courts do them Justice, when with their consciences and oaths they can.

2. That all the said Cases are clear in the Judgment of those who are learned in the Laws, that Consultation ought by the Law to be granted.

For as unto the first precedent, the case upon their own shewing appeareth to be, Three persons joyned in one Prohibition for three several parcels of Land, each of which had a several manner of Tything; and for that cause they could not joyn, when their interests were several; and therefore a Consultation was granted.

As to the second precedent, The manner of Tything was alledged to be paid to the Parson or Vicar, which was altogether uncertain.

As to the third precedent, The Modus never came in debate, but whether the Tythes did belong to the Parson or Vicar? which being betwixt two spiritual persons, the Ecclesiastical Court shall have Jurisdiction: and therewith agreeth 38 E. 3. 6. cited before by Bacon: and also there the Prior was of the Order of the Cistertians; for if the Tythes originally belonged to the Parson, any recompence for them shall not bar the Parson.

As unto the last precedent, the same was upon the matter of a Custom of a Modus Decimandi for Wool: for to pay the Tythe of Corn or Hay in kinde, in satisfaction of Corn, Hay and Wool, cannot be a satisfaction for the Wool; for the other two were due of common right; And all this appeareth in the Consultations themselves, which they shew, but understand not. To which the Bishop of London said, that the words of the Consultation were, Quod suggestio prædicta materiaque in eadem contenta minus sufficiens in Lege existit, &c. so as materia cannot be referred to form, and therefore it ought to extend to the Modus Decimandi.

To

To which I answered, That when the matter is insufficiently or uncertainly alledged, the matter it self faileth; for matter ought to be alledged in a good sentence: and although the matter be in truth sufficient, yet if it were insufficiently alledged, the plea wanteth matter. And the Lord Treasurer said openly to them, that he admired that they would alledge such things which made more against them than any thing which had been said. And when the King relied upon the said Prohibition in the Register, when Land is given in discharge of Tythes, the Lord Chancellor said, that that was not like to this case; for there, by the gift of the Land in discharge of Tythes, the Tythes were actually discharged: but in the case de Modo Decimandi, an annual sum is payed for the Tythes, and the Land remains charged with the Tythes, but ought to be discharged by plea de Modo Decimandi: All which was utterly denied by me; for the Land was as absolutely discharged of the Tythes in casu de Modo Decimandi, when an annual sum ought to be paid, as where Land is given: For all the Records and precedents of Prohibition in such cases are, That such a sum had been always, &c. paid in plenam contentationem, satisfactionem & exonerationem omnium & singularum Decimarum, &c. And although that the sum be not paid, yet the Parson cannot sue for Tythes in kind, but for the mony: for, as it hath been said before, the Custom and the said Acts of Parliament (where there is a lawful manner of Tything) hath discharged the Lands from Tythes in kinde, and prohibited, that no suit shall be for them. And although that now (as it hath been said) the Parsons, &c. may sue in the Spiritual Court pro Modo Decimandi, yet without question, at the first, the annual payment of mony was as Temporal, as annual profits of Lands were: All which the King heard with much patience. And the Lord Chancellor answered not to that which I had answered him in, &c.

And after that his most excellent Majesty, with all his Councel, had for three days together heard the allegations on both sides, He said, That he would maintain the Law of England, and that his Judges should have as great respect from all his Subjects as their predecessors had had: And for the matter, he said, that for any thing that had been said on the part of the Clergy, that he was not satisfied: and advised us his Judges to confer amongst our selves, and that nothing be encroached upon the Ecclesiastical Jurisdiction, and that they kep themselves within their lawful Jurisdiction, without unjust vexation and molestation done to his Subjects, and without delay or hindering of Justice. And this was the end of these three days consultations.

And note, That Dr. Bennet in his discourse inveighed much against the opinion in 8 E. 4. 14. and in my Reports in Wrights Case, That the Ecclesiastical Judg would not allow a Modus Decimandi; and said, That that was the mystery of iniquity, and that they would allow it. And the King asked, for what cause it was so said in the said Books? to which I answered, that it appeareth in Linwood, who was Dean of the Arches, and of profound knowledg in the Canon and Civil Law, and who wrote in the Reign of King Henry the fifth, a little before the said Case in 8 E. 4. in his title de Decimis, cap. Quoniam propter, &c. fol. 139. b. Quod Decimæ solvantur, &c. absque ulla diminutione: and in the glosse it is said, Quod Consuetudo de non Decimando, aut de non bene Decimando non valet. And that being written by a great Canonist of England, was the cause of the said saying in 8 E. 4. that they would not allow the said plea de Modo Decimandi; for always the Modus

Decimandi

Decimandi is less in value than the Tithes in specie, and then the same is against their Canon; Quod decimæ solvantur absque diminutione, & quod consuetudo de non plene Decimando non valet. And it seemed to the King, that that Book was a good Cause for them in the time of King Edward the fourth to say, as they had said; but I said, That I did not relie upon that, but upon the grounds aforesaid, (scil.) The common Law, Statute-Laws, and the continual and infinite judgements and judiciall proceedings, and that if any Canon or Constitution be against the same, such Canon and Constitution, &c. is void by the Statute of 25 H. 8. Cap. 19. which see and note: For all Canons, Constitutions, &c. against the Prerogative of the King, the common Laws, Statutes, or Customs of the Realm are void.

Lastly, the King said; That the high Commission ought not to meddle with any thing but that which is enormous and exorbitant, and cannot permit the ordinary Proces of the Ecclesiastical Law; and which the same Law cannot punish. And that was the cause of the institution of the same Commission, and therefore, although every offence, ex vi termini, is enormous, yet in the Statute it is to be intended of such an offence, as is extra omnem normam, as Heresie, Schisme, Incest, and the like great offences: For the King said, That it was not reason that the high Commission should have conusance of common offences, but to leave them to Ordinaries, scil. because that the party cannot have any appeal in case the high Commisson shall determine of it. And the King thought that two high Commissions, for either Province one, should be sufficient for all England, and no more.

XV. Mich. 39 and 40 Eliz. in the Kings Bench.

Bedell and Shermans Case.

MIch 39 and 40 Eliz. which is entred Mich. 40 Eliz. in the common Pleas, Rot. 699. Cantabr. the Case was this: Robert Bedel, Gent. and Sarah his wife, Farmors of the Rectory of Litlington in the County of Cambridge, brought an Action of Debt against John Sherman, in the custody of the Marshall of the Marshalsey, and demanded 550 l. And declared, that the Master and Fellows of Clare-Hall in Cambridge, were seised of the said Rectory in fee, in right of the said Colledge, and in June 10. 29 Eliz. by Indenture demised to Christopher Phesant the said Rectorie, for 21 years, rendring 17 l. 15 s. 5 d. and reserving Kent-corn according to the Statute, &c. which Kent was the ancient Kent, who entred into the said Rectory, and was possessed, and assigned all his interest thereof to one Matthew Batt, who made his last Will and Testament, and made Sarah his wife his Executrix, and died; Sarah proved the Will, and entred, and was thereof possessed as Executrix, and took to husband the said Robert Bedel, by force whereof, they in the right of the said Sarah, entred, and were possessed thereof; and that the Defendant was then Tenant, and seised for his life of 300 acres of arable Lands in Litlington aforesaid, which ought to pay Tithes to the Rector of Litlington, and in anno 38 Eliz. the Defendant, grano seminavit 200 acres parcel, &c. And that the Tithes of the same, did amount to 150 l. and that the Defendant did not divide nor set forth the same from the 9 parts, but took and carried them away, against the form and effect of

of the Statute of 2 E. 6, &c. And the Defendant pleaded Nihil debet, and the Jury found that the Defendant did owe 55 l. and to the residue they found Nihil debet, &c. and in arrest of Judgment, divers matters were moved.

1. That grano seminata is too generall and incertain, but it ought to be expressed with what kind of corn the same was sowed.

2. It was moved, If the Parson ought to have the treble value, the forfeiture being by expresse words limited to none by the Act, or that the same did belong to the Queen.

3. If the same did belong to the Parson, if he ought to sue for the same in the Ecclesiastical Court, or in the Kings Temporall Court.

4. If the husband and wife should joyn in the Action, or the husband alone should have the Action, and upon solemn argument at the Barre, and at the Bench, the Judgment was affirmed.

XVI. Trinity Term. 7 Jacob. in the Court of Wards.

John Bailies Case.

IT was found by Writ of Diem clausit extremum, That the said John Bailie was seised of a Messuage or Tenement, and of, and in the fourth part of one acre of land, late parcel of the Demesne lands of the Mannor of Newton, in the County of Hereford, in his Demesne as of fee, and found the other points of the Writ; and it was holden by the two chief Justices, and the chief Barons:

1. That Messuagium, vel Tenementum, is uncertain; for Tenementum is nomen collectivum, and may contain land, or any thing which is holden.

2. It was holden, that it was void for the whole, because that no Town is mentioned in the Office where the Messuage or Tenement, or the fourth part of the acre lieth, and from the Milne of the Mannor upon a Traberse none can come, because it is not affirmed by the Office, that they are parcel of the Mannor, but Nuper parcel of the Mannor, which implieth, that now they are not, and it was holden by them, that no Melius inquirendum shall issue forth, because that the whole Office is incertain and void.

XVII. Trinity. 7 Jacobi Regis in the Court of Wards.

THe Attorney of the Court of Wards, moved the two chief Justices and chief Baron in this Case, That a man seised of lands in fee-simple, covenants for the advancement of his son, and of his name, and blood, and posterity, that he will stand seised of them, to the use of himself for the term of his life, and after to the use of his eldest son, and to such a woman which he shall marry, and to the heirs males of the body of the son, and afterwards the father dieth, and after the son taketh a wife and dieth; if the wife shall take an Estate for life, and the doubt was, because the wife of the son was not within the Considerations, and the use was limited to one who was capable (scil.) the son, and to another who was not capable, and therefore the son should take an estate in tail executed. But it was resolved by the said two chief Justices and chief Baron,

Baron, That the Wife should take well enough: and as to the first Reason, they resolved, That the Wife was within the consideration, for the consideration was for the advancement of his posterity; and without a Wife, the Son cannot have posterity: also when the Wife of the Son is sure of a Joynture, the same is for the advancement of the Son, for thereby he shall have the better marriage. And as to the second, it was resolved, that the estate of the Son shall support the use to the Defendant: and when the contingent happeneth, the Estate of the Son shall be changed according to the limitation, scil. to the Son and the woman, and the Heirs of the body of the Son: And so it was resolved in the Kings Bench by Popham chief Justice, and the whole Court of the Kings-Bench, in the Reign of Queen Eliz. in Sheffields Case, for both points.

XVIII. Trinit. 7 Jacobi Regis: In the Court of Wards.

Sparies Case.

JOhn Spary, seised in fee in the right of his Wife of Lands holden of the Crown by Knights service, had issue by her, and 22. Decemb. anno 9 Eliz. aliened to Edward Lord Stafford; the Wife dyed, the issue of full age, the Lands continue in the hands of the Alienee, or his Assigns; and ten years after the death of the Father, and twelve years after the death of the Mother, Office is found, 7 Jacobi, finding all the special matter after the death of the Mother: the Question was, Whether the mean profits are to be answered to the King? And it was resolved by the said two chief Justices, and the chief Baron, that the King should not have the mean profits, because that the Alienee was in by title; and until Entry the Heir hath no remedy for the mean profits, but that the King might seise and make Livery, because that the Entry of the Heir is lawful by the Statute of 32 H. 8.

XIX. Trinit. 7 Jacobi Regis: In the Court of Wards.

IT was found by force of a Mandamus at Kendal in the County of Westmerland the 21 of December, 6 Jacobi Regis, That George Earl of Cumberland, long before his death, was seised in tayl to him and to the Heirs males of his body, of the Castles and Mannors of Browham, Appleby, &c. the Remainder to Sir Ingram Clifford, with divers Remainders over in tayl; the Remainder to the right Heirs of Henry Earl of Cumberland, Father of the said George: and that the said George, Earl, so seised by Fine and Recovery, conveyed them to the use of himself and Margaret his Wife for their lives, for the Joynture of the said Margaret; and afterwards to the Heirs males of the body of George Earl of Cumberland, and for want of such issue, to the use of Francis, now Earl of Cumberland, and to the Heirs males of his body begotten; and for want of such issue, to the use of the right Heirs of the said George: and afterwards, by another Indenture, conveyed the Fee-simple to Francis, Earl: By force of which, and of

the Statute of Uses, they were seised accordingly: and afterwards, 30 Octob. anno 3 Jacobi, the said George Earl of Cumberland dyed without heir male of his body lawfully begotten: and further found, that Margaret, Countess of Cumberland that now is, was alive, and took the profits of the premisses from the death of the said George Earl of Cumberland until the taking of that inquisition; and further found the other points of the Writ.

And first it was objected, that here was no dying seised found by Office, and therefore the Office shall be insufficient: But as to that, it was answered and resolved, That by this Office the King was not entitled by the common Law, for then a dying seised, or at first a dying the day of his death was necessary: But this Office is to be maintained upon the Statute of 32 and 34 H. 8. by force of which no dying seised is requisite, but rather the contrary, (scil.) If the Land be (as this case is) conveighed to the Wife, &c. And so it was resolved in Vincents case, anno 23 Eliz. where all the Land holden in Capite was conveighed to the younger Son, and yet the eldest Son was in Ward, notwithstanding that nothing descended.

The second Objection was, It doth not appear that the Estate of the Wife continued in her until the death of the Earl, for the Husband and Wife had alienes the same to another; and then no primer seisin shall be, as it is agreed in Binghams case.

As to that, it was answered and resolved, That the Office was sufficient prima facie for the King, because it is a thing collateral, and no point of the Writ; and if any such alienation be (which shall not be intended) then the same shall come in of the other part of the Alienee by a Monstrans de droit; and the case at Bar is a stronger case, because it is found, that the said Countess took the profits of the premisses from the death of George the Earl, until the finding of the Office.

XX. Trinity Term, 7 Jacobi: In the Court of Wards.

Wills Case.

HEnry Wills, being seised of the fourth part of the Mannor of Wryland in the County of Devon, holden of Queen Elizabeth in Socage-tenure in capite, of the said fourth part enfeoffed Zachary Irish and others, and their Heirs, to the use of the said Henry for the term of his life, and afterwards to the use of Thomas Wills his second son in tayl, and afterwards to the use of Richard Wills his youngest son in tayl; and for default of such issue, to the use of the right Heirs of the said Henry: and afterwards the said Henry so seised as abovesaid died, thereof seised, William Wills being his Son and Heir of full age; Thomas the second Son entred as into his Remainder: All this matter is found by Office, and the question was, if the King ought to have primer seisin in this case, and that Livery or Ouster le main shall be sued in this case by the Statutes of 32 and 34 H. 8. And it was resolved by the two chief Justices and the chief Baron, that not: If in this case by the common Law no Livery or Ouster le main shall be sued: and that was agreed by them all by the experience and course of the Court. See 21 Eliz. Dyer 362. If Tenant in Socage dyeth seised

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in possession his Heir within the age of fourteen years, he shall not sue Livery, but shall have an Ouster le main, una cum exitibus; but otherwise it is, if the Heir be of the age of fourteen years, which is his full age for Socage: and therewith agreeth 4 Eliz. Dyer 213.

And two precedents were shewed, which were decreed in the same Court by the advice of the Justices Assistants to the Court.

One in Trinity Term, 16 Eliz. Thomas Stavely the Father enfeoffed William Strelly and Thomas Law of the Mannor of Ryndly in the County of Nottingham, upon condition that they re-enfeoff the Feoffor and his Wife for their lives, the remainder to Thomas Stavely son and heir apparant of the Feoffor in Fee, which Mannor was holden of Queen Elizabeth in Socage in capite: and upon consideration of the saving in the Statute of 32 H. 8. next after the clause concerning Tenure in Socage in chief, it was resolved, That no Livery or Ouster le main should be sued in such case, and the reason was, because that the precedent clause giveth liberty to him who holdeth in Socage in chief, to make disposition of it, either by act executed, or by Will at his free will and pleasure: and before the said act, no Livery or Ouster le main should be sued in such case: and the words of the Saving are, Saving, &c. to the King, &c. all his right, &c. of primer seisin and relief, &c. for Tenure in Socage, or of the nature of Tenure in Socage in chief, as heretofore hath been used and accustomed: But there was no use or custom before the Act, that the King should have any primer seisin, or relief in such case: and the words subsequent in the said Saving depend upon the former words, and do not give any primer seisin or relief where none was before.

Another precedent was in Pasc. 37 Eliz. in the Book of Orders, fol. 444. where the case was, that William Allet was seised of certain Lands in Pitsey called Lundsey, holden of the Queen in Socage in chief, and by Deed covenanted to stand seised to the use of his Wife for life, and afterwards to the use of Richard his younger son in Fee, and died, his Heir of full age; and all that was found by Office, and it was resolved, ut supra, That no Livery or Ouster le main should be sued in that case: but the doubt in the case at Bar was, because that Henry the Feoffor had a Reversion in Fee, which descended to the said William his eldest son.

XXI. Trinity Term, anno 7 Jacobi Regis. The Case of the Admiralty.

A Bill was preferred in the Star-Chamber against Sir Richard Hawkins Vice-Admiral of the County of Devon: and was charged, that one William Hull and others were notorious Pirats upon the High Seas, and shewed in certain, what Piracy they had committed: the said Sir Richard Hawkins knowing the same, did them receive, abett and comfort within the body of the County, and for bribes and rewards suffered them to be discharged. And what offence that was, the Court referred to the consideration of the two chief Justices and the chief Baron, who heard Council of both sides divers days at Serjeants Inn.

And first, it was by them resolved, that by the Common Law the Admirals ought not to meddle with any thing done within the Realm, but onely with things done upon the Sea; and that appeareth fully by

the Statute of 13 R. 2. cap. 5. by which it appeareth, that such was the Common Law in the time of King Edw. the third, and therewith agreeth the Statute of 2 H. 4. cap. 11. and the Statute of 15 H. 2. cap. 3. That because the Admirals and their Deputies encroach to themselves divers Jurisdictions and Franchises more than they ought to have, Be it enacted, that all Contracts, Pleas and Complaints, and all other things arising within the bodies of the Counties as well by Land as by Water, as also of Wreck of the Sea, the Admiral Court shall not have any conusance, power, or jurisdiction, &c. Nevertheless of the death of a man, and of Mayheme done in great Ships, being in the main stream of great Rivers, onely below the Bridges nigh to the Sea, and not in other places of the same Rivers; and to arrest Ships in the great Flotes for the great Voyage of the King and of his Realm: and by the Statute of 2 H. 5. cap. 6. the Admirals of the King of England have done and used reasonably, according to the ancient Law and Custom, upon the main Sea. See the Statute of 5 Eliz. cap. 5. And all this appeareth to be by the Common Law: and with that agreeth Stamford fol. 51. And if a man be killed or slain within the Arms of the Sea, where a man may see from the one part of the Land to the other, the Coroner shall inquire of it, and not the Admiral, because that the Countrey may well know it: and he boucheth 8 E. 2. Coron. 399. So saith Stamford; the same proves that by the common Law before the Statute of 2 H. 4. cap. 11. the Admiral shall not have Jurisdiction unless upon the High Sea. See Pla. Com. 37. 6. If the Marshal holdeth Plea out of the Verge, or the Admiral within the body of the County, the same is void. See 2 R. 3. 12. 30 H. 6. 6. by Prisoit.

2. It was resolved, that the said Statutes are to be intended of a power to hold Plea, and not of a power to award execution, (scil.) de jurisdictione tenendi placiti; non de jurisdictione exequendi: For notwithstanding the said Statutes, the Judge of the Admiralty may do execution within the body of the County: and therefore in 19 H. 6. 7. the case was, W. T. at Southwark affirmed a Plaint of Trespasse in the Court of Admiralty before the Steward of the Earl of Huntington against J. B. of a Trespasse done upon the High Sea, upon which issued a Citation to cite the said J. B. to appear before the Steward aforesaid at the common day then next ensuing, directed to P. who served the said Citation: at which day the said J. B. made default: and the usage of the Court is, that if the Defendant maketh default, he shall be amerced by the discretion of the Steward, to the use of the Plaintiff: The which J. B. for his default aforesaid, was amerced to twenty marks; whereupon command was made to the said P. as Minister of the Court aforesaid, to take the goods of the said J. B. to make agreement with the beforesaid W. T. by force of which he for the said twenty marks took five Cows, and an hundred sheep, in execution for the mony aforesaid, in the County of Leicester. And there it is holden by Newton, and the whole Court, that the Statutes restrain the power of the Court of Admiralty to hold Plea of a thing done within the body of the County, but they do not restrain the Execution of the same Court to be served upon the Land: for it may be that the party hath not any thing upon the Sea, and then it is reason to have it upon the Land: and if such a Defendant have nothing wherewithall to make agreement, they of the Court have power to take the body of such a Defendant upon the Land in execution.

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In which case these points were observed:

1. Although that the Court of Admiralty is not a Court of Record, because they proceed there according to the Civil Law, (see Brook, Error 77. acc.) yet by custom of the Court they may amerce the Defendant for his default by their discretion.

2. That they may make execution for the same of the goods of the Defendant in corpore Comitatus: and if he hath not goods, then they may arrest the body of the Defendant within the body of the County.

But the great Question between them was, If a man committeth Piracy upon the Sea, and one knowing thereof, receiveth and comforteth the Defendant within the body of the County; if the Admiral and other the Commissioners, by force of the Act of 28 H. 8. cap. 16. may proceed by Indictment and conviction against the Receiver and Abettor, in as much as the offence of the Accessary hath his beginning within the body of the County? See this point resolved 8 Eliz. Dyer per curiam, which is omitted out of the printed Book.

And it was resolved by them, that such a Receiver and Abettor by the Common Law could not be indicted or convicted, because that the common Law cannot take conusance of the original Offence, because that is done out of the Jurisdiction of the common Law: and by consequence, where the common Law cannot punish the principal, the same shall not punish any one as accessary to such a principal. And therefore Coke chief Justice reported to them a Case which was in Suffolk in anno 28 Eliz. where Butler and others upon the Sea, next to the Town of Laystaft in Suffolk, robbed divers of the Queens subjects, and spoiled them of their goods, which goods they brought into Norfolk; and there they were apprehended, and there brought before me, then a Justice of the Peace within the same County, whom I examined, and in the end they confessed a cruel and barbarous Piracy, and that those goods which then they had with them, were part of the goods which they had robbed from the Queens subjects upon the High Sea: and I was of opinion, that in that Case it could not be Felony punishable by the common Law, because that the original act, (scil.) the taking of them, was not any offence whereof the common Law taketh knowledg; and by consequence, the bringing of them into a County could not make the same Felony punishable by our Law: and it is not like, where one stealeth goods in one County, and bring them into another, there he may be indicted of Felony in any of the Counties, because that the original act was Felony, whereof the common Law taketh knowledge: and yet notwithstanding I committed them to the Gaol, until the coming of the Justices of Assises. And at the next Assises the Opinion of Wray chief Justice, and Periam Justices of Assise, was, That for as much as the common Law doth not take notice of the original Offence, the bringing of the goods stoln upon the Sea into a County, did not make the same punishable at the Common Law: and thereupon they were committed to Sir Robert Southwell, then Vice-Admiral of the said Counties: and this in effect agrees with Lacies case, which see in my Reports cited in Binghams case in the 2 Reports 93. and in Constables case, C. 5. Reports 107.

So the Piracy was Felony, the Book of 40 Assis. 25. by Schard. where a Master or Captain of a Ship, together with some Englishmen, robbed the Kings Subjects upon the High Seas; where he saith, that it was Felony in the Norman Captain, and Treason in the Englishmen his companions: and the reason of the said case was, because the Normans were not then under the Obedience and Allegeance of the King

of

of England (for King John loſt Normandy) and for that cauſe Piracy was but Felony in the Norman, but in the Engliſh who were under the Obedience and Allegeance of the King of England, the ſame was adjudged Treaſon, which is to be underſtood of Petit Treaſon, which was High Treaſon before: and therefore in that caſe, the Pirates being apprehended, the Norman Captain was hanged, and the Engliſh men were hanged and drawn, as appeareth by the ſame Book: ſee Stamford 10.

And ſome objected, and were of opinion, That Treaſons done out of the Realm might have been determined by the common Law; but truly the ſame could not be puniſhable, but onely by the Civil Law before the Admiral, or by Act of Parliament, as all Forreign Treaſons and Felonies were by the common Law: and therefore where it is declared by the Statute of 25 E. 3. That adherence to the Enemies of the King within England, or elſewhere, is Treaſon, the ſame ſhall be tryed by the common Law: but where it is done out of the Realm, the Offendor ſhall not be attainted but by Parliament, untill the Statute of 35 H. 8. cap. 2. although that there are Opinions in ſome Books to the contrary: ſee 5 R. 2. Quare impedit, &c.

XXII. Trinit. 7 Jacobi Regis: In the Common-Pleas.

Pettus and Godſalves Caſe.

IN a Fine levyed Trinity Term, anno quinto of this King, between John Pettus Eſq; Plaintiff, and Roger Godſalve and others, Deforceants of the Mannor of Caſtre, with the appurtenances, &c. in the County of Norfolk, where in the third proclamation upon the Foot of the ſame Fine the ſaid proclamation is ſaid to have been made in the fifth year of the King that now is, which ought to have been anno quinto of the King: and whereas upon the Foot of the ſame Fine, the fourth proclamation is altogether left out, becauſe upon the view of the proclamations upon Doriſs, upon Record, not finis ejuſdem Termini per Juſticiarios, remaining with the Chirographer, and the Book of the ſaid Chirography, in which the ſaid proclamations were firſt entered, it appeareth, that the ſaid proclamations were rightly and duly made, therefore it was adjudged, that the Errors or defects aforeſaid ſhould be amended, and made to agree as well with the proclamation upon Record of the ſaid Fine, and Entry of the ſaid Book, as with the other proclamations in Doriſs ſuper pedes aliorum finium of the ſame Term: and this was done upon the motion of Haughton Serjeant at Law.

XXIII. Mich. 7 Jacobi: In the Court of Wards.

Sammes Caſe.

JOhn Sammes being ſeiſed of Grany Mead by Copy of Court-Roll of the Mannor of Tolleſham the great, of which Sir Thomas Beckingham, &c. and held the ſame of the King by Knights ſervice in capite; Sir Thomas by his Deed indented, dated the 22 of December, in the

first

first year of King James, made between him of the one part, and the said John Sammes and George Sammes Son and Heir apparant of the said John of the other part, did bargain, sell, grant, enfeoff, release, and confirm unto the said John Sammes the said Mead called Grany Mead, to have and to hold the said Mead unto the said John Sammes and George Sammes, and their Heirs and Assignes, to the onely use and behoof of the said John Sammes and George Sammes, their Heirs and Assigns for ever: and by the same Indenture Sir Thomas did Covenant with John and George, to make further assurance to John and George, and their Heirs, to the use of them and their Heirs, and Livery and Seisin was made and delivered according to the true intent of the said Indentures of the within mentioned premisses to the uses within mentioned.

John Sammes the Father dyeth, George Sammes his Son and Heir being within age, the Question was, Whether George Sammes should be in Ward to the King or no? And in this case three points were resolved:

1. For as much as George was not named in the premisses, he cannot take by the Habendum; and the Livery made according to the intent of the Indenture, doth not give any thing to George, because the Indenture as to him is voyd: but although the Feoffment be good onely to John and his Heirs, yet the use limited to the use of John and George, and their Heirs, is good.

2. If the Estate had been conveyed to John and his Heirs by the Release or Confirmation, as it well may be to a Tenant by Copy of Court Roll, the use limited to them is good: for upon a Release which creates an Estate, a use may be limited, or a Rent reserved without question; but upon a Release or Confirmation, which enures by way of Mitter le droit, an use cannot be limited, or a Rent reserved.

But the third was of greater doubt, If in this case the Father and Son were Joynt-tenants, or Tenants in common? For it was objected, when the Father is onely enfeoffed to the onely use of him and his Son, and their Heirs in the Per, that in this case, they shall be Tenants in common. By the Feoffment the Father is in by the common Law in the Per, and then the limitation of the use to him and his Son, and to their Heirs, cannot devest the Estate, which was vested in him by the common Law, out of him, and vest the Estate in him in the Post by force of the Statute, according to the limitation of the use: and therefore, as to one moyety, the Father shall be in by force of the Feoffment in the Per, and the Son, as to the other moyety, shall be in by force of the Statute, according to the limitation of the use in the Post, and by consequence they shall be Tenants in common. But it was answered and resolved, That they were Joynt-tenants, and that the Son in the Case at Bar should have the said Grange by the Survivor: for if at the Common Law A. had been enfeoffed to the use of him and B. and their Heirs, although that he was onely seised of the Land, the use was joyntly to A. and B. For a use shall not be suspended or extinct by a sole seisin, or joynt seisin of the Land: and therefore if A. and B. be enfeoffed to the use of A. and his Heirs, and A. dyeth, the entire use shall descend to his Heir: as it appeareth in 13 H. 7. 6. in Stoners Case: and by the Statute of 27 H. 8. cap. 10. of Uses, it appeareth, That when several persons are seised to the use of any of them, that the Estate shall be executed according to the use.

And as to that which was said, That the Estate of the Land which the Father hath in the Land, as to the moyety of the use which he himself

self hath, shall not be devested out of him: To that it was answered and resolved, That that shall well be: for if a man maketh a Feoffment in Fee to one, to the use of him and the Heirs of his body, in this case, for the benefit of the issue, the Statute according to the limitation of the uses devests the Estate vested in him by the common Law, and executes the same in himself by force of the Statute; and yet the same is out of the words of the Statute of 27 H. 8. which are, Where any person, &c. stand or be seised, &c. to the use of any other person; and here he is seised to the use of himself: and the other clause is, Where divers and many persons, &c. be joyntly seised, &c. to the use of any of them, &c. and in this case A. is sole seised: But the Statute of 27 H. 8. hath been always beneficially expounded, to satisfy the intention of the parties, which is the direction of the use according to the Rule of the Law. So if a man, seised of Lands in Fee-simple, by Deed covenant with another, that he and his Heirs will stand seised of the same Land, to the use of himself and the Heirs of his body, or unto the use of himself for life, the remainder over in Fee; in that case, by the operation of the Statute, the Estate which he hath at the common Law is devested, and a new Estate vested in himself, according to the limitation of the use. And it is to be known, that an use of Land (which is but a pernancy of the profits) is no new thing, but part of that which the owner of the Land had: and therefore, if Tenant in Borough-English, or a man seised of the part of his Mother, maketh a Feoffment to another without consideration, the younger Son in the one case, and the Heir on the part of the Mother on the other, shall have the use, as they should have the Land it self, if no Feoffment had been made: as it is holden in 5 E. 4. 7. See 4 and 5 Phil. and Mar. Dyer 163. So if a man maketh a Feoffment unto the use of another in tayl, and afterwards to the use of his right Heirs, the Feoffor hath the Reversion of the Land in him; for if the Donee dyeth without issue, the Law giveth the use, which was part of the Land, to him: and so it was resolved, Trinity, 31 Eliz. between Fenwick and Milford in the Kings-Bench. So in 28 H. 8. Dyer 11. the Lord Rosses Case: A man seised of one Acre by Priority, and of another Acre by Posteriority, and make a Feoffment in Fee of both to his use: and it was adjudged, that although both passe at one instant, yet the Law shall make a Priority of the uses, as if it were of the Land it self: which proves, that the use is not any new thing, for then there should be no Priority in the Case: See 13 H. 7. b. by Butler.

So in the Case at Bar, The use limited to the Feoffee and another, is not any new thing, but the pernancy of the old profits of the Land, which well may be limited to the Feoffee and another joyntly: But if the use had been onely limited to the Feoffee and his Heirs, there, because there is not any limitation to another person, nec in præsenti, nec in futuro, he shall be in by force of the Feoffment.

And it was resolved, That Joynt-tenants might be seised to an use, although that they come to it at several times: as, if a man maketh a Feoffment in Fee to the use of himself, and to such a woman, which he shall after marry, for term of their lives, or in tayl, or in fee; in this case, if after he marrieth a Wife, she shall take joyntly with him, although that they take the use at several times, for they derive the use out of the same fountain and Freehold, scil. the Feoffment: See 17 Eliz. Dyer 340. So if a Disseisin be had to the use of two, and one of them agreeth at one time, and the other at another time, they shall be

be Joynt-tenants; but otherwise it is of Estates which pass by the common Law: and therefore if a Grant be made by Deed to one man for term of life, the Remainder to the right Heirs of A. and B. in Fee, and A. hath issue and dyeth, and afterwards B. hath issue and dyeth, and then the Tenant for life dyeth; in that case the Heirs of A. and B. are not Joynt-tenants, nor shall joyn in a Scire facias to execute the Fine, 24 E. 3. Joynder in Action 10. because that although the remainder be limited by one Fine, and by joynt words, yet because that by the death of A. the Remainder as unto the moyety vested in his Heir, and by the death of B. the other moyety vested in his Heir at several times, they cannot be Joynt-tenants: But in the case of a use, the Husband taketh all the use in the mean time; and when he marryeth, the Wife takes it by force of the Feoffment and the limitation of the use joyntly with him, for there is not any fraction and several vesting by parcels, as in the other case, and such is the difference. See 18 E. 3. 28. And upon the whole matter it was resolved, That because in the principal case the Father and Son were Joynt-tenants by the original purchase, that the Son having the Land by Survivor, should not be in Ward: and accordingly it was so decreed.

XXIV. Pasc. 39 Eliz. Rot. 233. In the Kings-Bench.

Collins and Hardings Case.

THe Case between Collins and Harding was, A man seised of Lands in Fee, and also of Lands by Copy of Court Roll in Fee, according to the Custome of the Mannor, made one entire Demise of the Lands in Fee, and of the Lands holden by Copy according to the Custom, to Harding for years, rendering one entire Rent: and afterwards the Lessor surrendered the Copyhold Land to the use of Collins and his Heirs: and at another time granted by Deed the Reversion of the Freehold Lands to Collins in Fee, and Harding attorned; and afterwards for the Rent behind, Collins brought an Action of Debt for the whole Rent: And it was objected, That the reservation of the Rent was an entire contract, and by the Act of the Lessee the same cannot be apportioned: and therefore if one demiseth three Acres, rendering 3 s. Rent, and afterwards bargaineth and selleth, by Deed indented and inrolled, the Reversion of one Acre, the whole Rent is gone, because that the Contract is entire and cannot be severed by the Act of the Lessor: Also the Lessee by that shall be subject to two Fealties, where he was subject but to one before.

As to these points, it was answered and resolved, That the Contract was not entire, but that the same by the Act of the Lessor, and the assent of the Lessee, might be divided and severed: for the Rent is incident to the Reversion, and the Reversion is severable, and by consequence the Rent also: for accessarium sequitur naturam sui principalis, and that cannot be severed or divided by the assent of the Lessee, or express attornment, or implyed by force of an Act of Parliament, to which every one is a party, as by force of the Statute of Inrolments, or of Uses, &c. And as to the two Fealties, so that the Lessee shall be subject, although that the Rent shall be extinct: for Fealty is by necessity of Law incident to the Reversion, and to every part of it; but the Rent shall be divided pro rata portionis: and so it was adjudged.

And it was also adjudged, That although Collins cometh to the Reversion by several Conveyances, and at several times, yet he might bring an action of Debt for the whole Rent. Hill. 43 Eliz. Rot. 243. West and Lassels Case: A man made a Lease for years of certain Lands, and afterwards deviseth the Reversion of two parts to one, he shall have two parts of the Rent; and he may have an Action of Debt for the same, and have Judgment to recover. Hill. 42 Eliz. Rot. 108. in the Common-Pleas, Ewer and Moyls Case: The Devise of the Reversion of part shall abow for part of the Rent, and such Abowry shall be good and maintainable.

Note well these Cases and Judgments, for they are given upon great reason and consideration, for otherwise great inconvenience would ensue, if by severance of part of the Reversion, the entire Rent should be lost: and the opinion reported by Serjeant Benloes, in Hill. 6 and 7 E. 6. to the contrary, nihil valet, (scil.) That the Rent in such case shall be lost, because that no contract can be apportioned, which is not a Law: For, 1. A Rent reserved upon a Lease for years is more than a Contract, for it is a Rent-service. 2. It is incident to the Reversion which is severable. 3. Upon recovery of part in Waste, or upon entry in part for a forfeiture, or upon surrender of part, the Rent is apportionable.

25. Note; It was adjudged 19 Eliz. in the Kings-Bench, That where one obtained a Prohibition upon Prescription de Modo Decimandi, by payment of a certain sum of mony at a certain day; upon which issue was taken, and the Jury found the Modus Decimandi by payment of the said sum, but that it had been payd at another day: and the Case was well debated, and at the last it was resolved, That no Consultation should be granted; for although that the day of payment be mistaken, yet it appeareth to the Court, that no Tythes in kinde were due, for which the suit was in the Spiritual Court: and the Tryal of the Custom de Modo Decimandi belongeth to the Common Law, and a Consultation shall not be granted where the Spiritual Court hath not Jurisdiction of the Cause: Tanfield, chief Baron, hath the Report of this Case.

XXV. Mich. 7 Jacobi Regis.

In an Ejectione Firmæ, the Writ and Declaration were of two parts of certain Lands in Hetherset and Windham in Norfolk, and doth not say in two parts, in three parts to be divided; and yet it was good as well in the Declaration as in the Writ: for without question the Writ is good, de duabus partibus, generally, and so is the Register. See 4 E. 3. 162. 2 E. 3. 31. 2 Assis. 1. 10 Assis. 12. 10 E. 3. 511. 11 Ass. 21. 11 E. 3. Bre. 478. 9 H. 6. 36. 17 E. 4. 46. 19 E. 3. Bre. 244. And upon all the said Books it appeareth, that by the intendment and construction of the Law, when any parts are demanded without shewing in how many parts the whole is divided, that there remains but one part not divided: As if two parts are demanded, there remains a third part; and when three parts are divided, there remains a fourth part, &c. But when any demand is of other parts in other form, there he ought to shew the same specialty: as if one demandeth three parts of five

five parts, or four parts of six, &c. And according to this difference it was so resolved in Jourdens Case in the Kings-bench: and accordingly Judgment was given in this Term in the Case at Bar.

XXVI. Mich. 7 Jacobi Regis: In the Common-Pleas.

Muttons Case.

AN Action upon the Case was brought against Mutton, for calling of the Plaintif, Sorcerer and Inchanter, who pleaded Not-guilty; and it was found against him to the damages of 6 d. And it was holden by the whole Court in the Common-Pleas, that no action lieth for the said words: for Sortilegium est iei futuri per sortes exploratio: Et Sortilegus sive Sortilegista est qui per sortes futura prænunciat. Inchauntry est verbis aut rebus adjunctis aliquid præter naturam moliri: whereof the Poet saith,

Carminibus Circes socios mutavit Ulyssis.

See 45 E. 3. 17. One was taken in Southwark with the Head and Visage of a Dead man, and with a Book of Sorcery in his Pail: and he was brought into the Kings-Bench before Knevet Justice, but no Indictment was framed against him: for which the Clarks made him swear, that he should never after commit any Sorcery; and he was sent to prison: and the Head and the Book were burned at Tuthil, at the charges of the Prisoner. And the ancient Law was, as it appeareth by Britton, that those who were attainted of Sorcery were burned: but the Law is not such at this day; but he who is convicted of such imposture and deceit shall be fined and imprisoned. And it was said, that it was adjudged, That if one calleth another Witch, that an Action will not lie, for it is too general: Et dicitur Latine Venefica: But if one saith, She is a Witch, and hath bewitched such a one to death, an Action upon the Case lieth, if in truth he be dead. Conjuration is derived of these words, Con and juro: Et proprie dicitur quando multi in alicujus perniciem jurant: And in the Statute of 5 Eliz. cap. 16. it is taken for Invocation of any evil and wicked Spirits, i. est conjurare verbis conceptis aliquos malos & iniquos spiritus; the same is made Felony: But Witchcraft, Inchantment, Charm, or Sorcery, is not felony, if by them any person be not killed or dyeth. So that Conjuration est verbis conceptis compellere malos & iniquos spiritus aliquod facere vel dicere, &c. But a Witch, who works any thing by any evil spirit, doth not make any Conjuration or Invocation by any powerfull names of the Devil, but the wicked spirit comes to her familiarly, and therefore is called a Familiar: But if a man be called a Conjurer, or a Witch, he shall not have any Action upon the Case, unless that he saith, That he is a Conjurer of the Devil, or of any evil or wicked spirit: or, that one is a Witch, and that he hath bewitched any one to death, as is before said.

And note, that the first Statute which was made against Conjuration, Witchcraft, Sorcery, and Inchantment, was the Act of 33 H. 8. cap. 8. and by it they were Felony in certain cases special, but that Act was repealed by the Statute of 1 E. 6. cap. 12.

XXVII. Mich. Term, 7 Jacobi Regis; In the Court of Wards.

Sir Allen Percies Case.

SIr John Fitz and Bridget his Wife, being Tenants for life of a Tenement called Ramsham, the remainder to Sir John Fitz in tail, the remainder to Bridget in tail, the Reversion to Sir John and his Heirs: Sir John, and Bridget his Wife, by Indenture demised the said Tenement to William Sprey for divers years yet to come, except all Trees of Timber, Oaks and Ashes, and liberty to carry them away, rendering Rent, and afterwards Sir John died, having issue Mary his daughter, now the Wife of Sir Allen Percy Knight: and afterwards the said William Sprey demised the same Tenement to Sir Allen for seven years: The Question was, Whether Sir Allen, having the immediate inheritance in the right of his Wife, expectant upon the Estate for the life of Bridget, and also having the possession by the said Demise, might cut down the Timber Trees, Oaks, and Ashes: And it was objected, that he might well do it: for it was resolved in Saunders Case, in the fifth part of my Reports, fo. 12. That if Lessee for years, or for life, assigns over his term or Estate unto another, excepting the Mines, or the Trees, or the Clay, &c. that the exception is void, because that he cannot except that which he cannot lawfully take, and which doth not belong unto him by the Law. But it was answered and resolved by the two chief Justices, and the chief Baron, That in the Case at Bar, the Exception was good without question, because that he who hath the Inheritance, joyns in the Lease with the Lessee for life. And it was further resolved, That if Tenant for life Leaseth for years, excepting the Timber Trees, the same is lawfully and wisely done: for otherwise, if the Lessee or Assignee cutteth down the Trees, the Tenant for life should be punish'd in Waste, and should not have any remedy against the Lessee for years: and also if he demiseth the Land without exception, he who hath the immediate Estate of Inheritance, by the assent of the Lessee, may cut down all the Timber Trees, which when the term ended, all should be wasted, and then the Tenant for life should not have the Boots which the Law giveth him, nor the pawnage and other profits of the said Trees, which he lawfully might take: But when Tenant for life upon his Lease excepteth the Trees, if they be cut down by the Lessor, the Lessee or Assignee shall have an Action of Trespass, Quare vi & armis, and shall recover damages according to his loss.

And this case is not like to the said case of Saunders, which was affirmed to be good Law; for there the Lessee assigned over his whole interest, and therefore could not except the Mines, Trees, and Clay, &c. which he had not but as things annexed to the Land: and therefore he could not have them when he had departed with his whole interest, nor he could not take them either for Reparations or otherwise: But when Tenant for life Leaseth for years, except the Timber Trees, the same remaineth yet annexed to his Freehold, and he may command the Lessee to take them for necessary Reparations of the Houses. And in the said case of Saunders, a Judgment is cited between Foster and Miles

Plaintiffs,

Plaintiffs, and Spencer and Bourd Defendants, That where Lesse for years assigns over his term, except the Trees, that Waste in such case shall be brought against the Assignee, but in this case without question Waste lieth against the Tenant for life, and so there is a difference, &c.

XXVIII. Mich. Term, 7 Jacobi Regis: In the Court of Wards.

Hulmes Case.

THe King (in the right of his Dutchy of Lancaster) Lord: Richard Hulm (seised of the Mannor of Male in the County of Lancaster, holden of the King as of his Dutchy by Knights service) Mesne: and Robert Male (seised of Lands in Male, holden of the Mesn as of his said Mannor by Knights service) Tenant. Richard Hulm dyed; after whose death, 31 Hen. the eighth, it was, that he dyed seised of the said Penalty, and that the same descended to Edward his Son and Heir within age, and found the Tenure aforesaid, &c. And during the time that he was within age, Robert Male the Tenant dyed; after which, in anno 35 H. 8. it was found by Office, That Robert Male dyed seised of the said Tenancy perabail, and that the same descended to Richard his Son and Heir within age, and that the said Tenancy was holden of the King, as of his said Dutchy, by Knights service; whereas in truth the same was holden of Edward Hulm, then in Ward of the King, as of his Penalty: for which the King seised the Ward of the Heir of the Tenant. And afterwards, anno quarto Jacobi Regis that now is, after the death of Richard Male, who was lineal Heir of the said Robert Male, by another Office it was found, That the said Richard died seised of the said Tenancy, and held the same of the King, as of his Dutchy, by Knights service, his Heir within age: whereupon Richard Hulm, Cosin and Heir of the said Richard Hulm, had preferred a Bill to be admitted to his Traverse of the said Office found in quarto Jacobi Regis: And the Question was, Whether the Office found in 35 H. 8. be any estoppel to the said Hulm, to Traverse the said last Office? or if that the said Hulm should be driven first to Traverse the Office of 35 H. 8.

And it was objected, That he ought first to Traverse the Office of 35 H. 8. as in the Case of 26 E. 3. 65. That if two Fines be levyed of Lands in ancient Demesn, the Lord of whom the Land is holden ought to have a Writ of Deceit to reverse the first Fine; and in that the second Fine shall not be a Bar: And that the first Office shall stand as long as the same remains in force.

To which it was answered and resolved by the two Chief Justices and the Chief Baron, and the Court of Wards, That the finding of an Office is not any estoppel, for that is but an enquest of Office, and the party grieved shall have a Traverse to it, as it hath been confessed, and therefore without question the same is no estoppel; But when an Office is found falsly, that Land is holden of the King by Knights service in capite, or of the King himself in Socage, if the Heir sueth a general Livery, now it is holden in 46 E. 3. 12. by Moowbray and Persey, that he shall not after add, that the Land is not holden of the King,

King; but that is not any estoppel to the Heir himself who sueth the Livery, and shall not conclude his Heir: for so saith Mowbray himself expressly in 44 Assis. pl. 35. That an Estoppel by suing of Livery shall estop onely himself the Heir during his life: And in 1 H. 4. 6. b. there the case is put of express confession and suing of Livery by the issue in tayl upon a false Office: and there it is holden, that the Jurors upon a new Diem clausit extremum, after the death of such special Heir, are at large, according to their conscience, to finde that the Land is not holden, &c. for they are sworn ad veritatem dicendum: and their finding in called veredictum, quasi dictum veritatis; which reason also shall serve, when the Heir in Fee-simple sueth Livery upon a false Office, and the Jurors after his death ought to find according to the truth: So it is said 33 H. 6. 7. by Laicon, that if two sisters be found Heirs, whereof the one is a Bastard, if they joyn in a Suit of Livery, the which joyneth with the Bastard in the Livery, shall not alledg Bastardy in the other: but there is no Book that saith, that the Estoppel shall endure longer than during his life: and when Livery is sued by a special Heir, the force and effect of the Livery is executed and determined by his death, and by that the Estoppel is expired with the death of the Heir; but that is to be intended of a general Livery: but a special Livery shall not conclude one: But as it is expressed, the words of a general Livery are; When the Heir is found of full age: Rex Escaetori, &c. Scias quod cepimus homagium J. filii & hæredis B. defuncti de omnibus terris & tenementis quæ idem B. Pater suus tenuit de nobis in capite, die quo obiit, & ei terras & tenement. illa reddidimus, ideo tibi præcipimus, &c. And when the Heir was in Ward, at his full age, the Writ of Livery shall say, Rex, &c. Quia J. filius & hæres B. defuncti qui de nobis tenuit in capite ætatem suam coram te sufficienter probavit, &c. Ceperimus homagium ipsius J. de omnibus terris & tenementis, quæ idem B. Pater suus tenuit de nobi in capite die quo obiit, & ei terras & tenement. illa reddidimus, & ideo tibi præcipimus, ut supra, &c. Which Writ is the Suit of the Heir, and therefore although that all the words of the Writ are the words of the King, as all the Writs of the King are; and although that the Livery be general, de omnibus terris & tenementis de quibus B. pater J. tenuit de nobis in capite die quo obiit, without direct affirmation that any Manor in particular is holden in capite, and notwithstanding that the same is not at the prosecution of the Kings Writ, and no judgment upon it; yet because the general Livery is founded upon the Office, and by the Office it was found, That divers Lands or Tenements were holden of the King in capite, for this cause the suing of the Writ shall conclude the Heir onely which sueth the Livery, and after his death the Jurors in a new Writ of Diem clausit extremum, are at large, as before is said. And if that Jury find falsly in a Tenure of the King also, the Lord of whom the Land is holden may traverse that Office: Or if Land be holden of the King, &c. in Socage, the Heir may traverse the last Office, for by that he is grieved onely; and he shall not be driven to traverse the first Office: and when the Father sueth Livery, and dyeth, the conclusion is executed and past, as before is said. And note, that there is a special Livery, but that proceeds of the Grace of the King, and is not the Suit of the Heir, and the King may grant it either at full age, before ætate probanda, &c. or to the Heir within age, as it appeareth in 21 E. 3. 40. And that is general, and shall not comprehend any Tenure, as the general Livery doth, and therefore it is not any

estoppel

eſtoppel without queſtion. And at the Common Law, a ſpecial Livery might have been granted before any Office found: but now by the Statute of 33 H. 8. cap. 22. it is provided, That no perſon or perſons, having Lands or Tenements above the yearly value of 20 l. ſhall have or ſue any livery, before inquiſition or Office found, before the Eſcheator or other Commiſſion: But by an expreſs clauſe in the ſame Act; Livery may be made of the Lands and Tenements compriſed or not compriſed in ſuch Office; ſo that if Office be found of any parcel, it is ſufficient: And if the Land in the Office doth exceed 20 l. then the Heir may ſue a general Livery after Office thereof found, as is aforeſaid: but if the Land doth not exceed 5 l. by the year, then a general Livery may be ſued without Office by Warrant of the Maſter of the Wards, &c. See 23 Eliz Dyer. 177. That the Queen ex debito Juſtitiæ is not bound at this day, after the ſaid Act of 33 H. 8. to grant a ſpecial Livery; but it is at her election to grant a ſpecial Livery, or to drive the Heir to a general Livery.

It was alſo reſolved in this Caſe, That the Office of 35 H. 8. was not traverſable, for his own Traverſe ſhall prove, that the King had cauſe to have Wardſhip by reaſon of Ward: And when the King cometh to the poſſeſſion by a falſe Office, or other means, upon a pretence of right, where in truth he hath no right, if it appeareth that the King hath any other right or intereſt to have the Land there, none ſhall traverſe the Office or Title of the King, becauſe that the Judgment in the Traverſe is, Ideo conſideratum eſt, quod manus Domini Regis à poſſeſſione amoveantur, &c. which ought not to be, when it appeareth to the Court, that the King hath right or intereſt to have the Land, and to hold the ſame accordingly: See 4 H 4. fo. 33. in the Earl of Kents Caſe, &c.

XXIX. Mich. 7 Jacobi Regis.

Parliament.

Note; The Priviledg, Order, or Cuſtom of Parliament, either of the Upper Houſe, or of the Houſe of Commons, belongs to the determination or decision onely of the Court of Parliament: and this appeareth by two notable Precedents:

The one at the Parliament holden in the 27 year of King Henry the ſixth, There was a Controverſie moved in the Upper Houſe between the Earls of Arundel and of Devonſhire, for their ſeats, places; and preheminences of the ſame, to be had in the Kings preſence, as well in the High Court of Parliament, as in his Counſels, and elſewhere: The King, by the advice of the Lords ſpiritual and temporal, committed the ſame to certain Lords of Parliament, who for that they had not leiſure to examine the ſame, it pleaſed the King, by the advice of the Lords at this Parliament, in anno 27 of his Reign, That the Judges of the Land ſhould hear, ſee, and examine the Title, &c. and to report what they conceive herein: The Judges made report as followeth; That this matter (viz. of Honor and precedency between the two Earls, Lords of Parliament) was a matter of Parliament, and belonged to the Kings Highneſs, and the Lords ſpiritual and temporal in Parliament, by them to be decided and determined; yet being there ſo commanded, they ſhewed what they found upon examination, and their Opinions thereupon.

Another Parliament in 31 H. 6. which Parliament begun the ſixth of

of March, and after it had continued some time, it was prorogued until the fourteenth of February: and afterwards in Michaelmas Term, anno 31 H. 6. Thomas Thorp, the Speaker of the Commons House, at the Suit of the Duke of Buckingham, was condemned in the Exchequer in 1000 l. damages for a Trespass done to him: The 14 of February, the Commons moved in the Upper House, That their Speaker might be set at liberty, to exercise his place: The Lords refer this case to the Judges, and Fortescue and Prisot, the two chief Justices, in the name of all the Judges, after said consideration and mature deliberation had amongst them; answered and said, That they ought not to answer to this question, for it hath not been used aforetime, That the Justices should in any wise determine the Privileg of this High Court of Parliament; for it is so high and mighty in its nature, that it may make Laws; and that that is law, it may make no Law: and the determination and knowledg of that Privileg belongeth to the Lords of the Parliament, and not to the Justices: But as for proceedings in the lower Courts in such cases, they delivered their Opinions. And in 12 E. 4. 2. in Sir John Pastons case, it is holden, that every Court shall determine and decide the Privileges and Customs of the same Court, &c.

XXX. Hilary Term, 7 Jacobi Regis: In the Star-Chamber.

Heyward and Sir John Whitbrokes Case.

IN the Case between Heyward and Sir John Whitbroke in the Star-Chamber, the Defendant was convicted of divers Misdemeanors, and Fine, and Imprisonment imposed upon him, and damages to the Plaintiff: and it was moved that a special Process might be made out of that Court to levy the said damages upon the Goods and Lands of the Defendant: and it was referred to the two chief Justices, whether any such Process might be made? who this Term moved the Case to the chief Baron, and to the other Judges and Barons; and it was unanimously resolved by them, That no such Process could or ought to be made, neither for the damages nor for the costs given to the Plaintiff: for the Court hath not any power or Jurisdiction to do it, but only to keep the Defendant in prison until he pay them. For, for the Fine due to the King, the Court of Star-Chamber cannot make forth any Process for the levying of the same, but they estreat the same into the Exchequer, which hath power by the Law to writ forth Process to the Sheriff to levy the same. But if a man be convicted in the Star-Chamber for Forgery upon the Statute of 5 Eliz. that in that case, for the double costs and damages, that an English Writ shall be made, directed to the Sheriff, &c. reciting the conviction, and the Statute for the levying of the said costs and damages of the goods and chattels, and profits of the Lands of the Defendant, and to bring in the mony into the Court of Star-Chamber, and the Writ shall be sealed with the great Seal, and the Test of the King: For the Statute of 5 Eliz. hath given Jurisdiction to the Court of Star-Chamber, and power to give Judgment (amongst other things) of the costs and damages, which being given by force of the said Act of Parliament, by consequence the

the Court by the Act hath power to grant Execution; Quia quando aliquid conceditur, ei omnia concedi videntur per quæ devenitur ad illud. And it was resolved, That the giving of the damages to the Plaintiff was begun but of late times: and although that one or two Precedents were shewed against this Resolution, they being against the Law, the Judges had not any regard to them. The like Resolution was in the Case of Langdale in that Court.

XXXI. Hilary Term, 7 Jacobi Regis: In the Common-Pleas.

Morse and Webbs Case.

IN a Replevin brought by John Morse against Robert Webb of the taking of two Oxen the last day of November in the third year of the Reign of the King that now is, in a place called the Downfield in Luddington in the County of Worcester: The Defendant, as Bayliff to William Sherington, Gent. made Conusance, because that the place where is an Acre of Land which is the Freehold of the said William Sherington, and for damage-feasants, &c. In Bar of which Avowry the Plaintiff said, That the said Acre of Land is parcel of Downfield, and that he himself, at the time, and before the taking, &c. was and yet is seised of two yard Land, with the appurtenances, in Luddington aforesaid: And that he, and all those whose Estate he hath in the said two yards of Land, time out of minde, &c. have used to have Common of pasture per totum contentum of the said place called the Downfield, whereof, &c. for four Beasts called Kother Beasts, and two Beasts called Horse-beasts, and for sixty Sheep, at certain times and seasons of the year, as to the said two yard Lands, with the appurtenances appertaining: and that he put in the said two Oxen to use his Common, &c. And the Defendant did maintain his Avowry, and traversed the Prescription, upon which the parties were at issue, and the Jury gave a special Verdict, That before the taking, one Richard Morse, Father of the said John Morse, and now Plaintiff, whose Heir he is, was seised of the said two yards Land, and that the said Richard Morse, &c. had the Common of Pasture for the said Chattel, per totum contentum of the said Downfield, in manner and form as before is alledged, and so seised; The said Richard Morse, in the twentieth year of Queen Elizabeth, demised to William Thomas and John Fisher divers parcels of the said two yard Lands, to which, &c. viz. the four Buts of arable, with the Common and intercommon to the same belonging, for the term of four hundred years; by force of which the said William Thomas and John Fisher entred, and were possessed: and the said Richard so seised, died thereof seised; by which the said two yard Lands in possession and Reversion descended to the said John Morse the now Plaintiff: And if upon the whole matter, the said John Morse now hath, and at the time of the taking, &c. had Common of Pasture, &c. for four Beasts called Kother Beasts, and two Beasts called Horse-Beasts, and for sixty Sheep, &c. as to the said two Acres of Land, with the appurtenances belonging, in Law or not, the Jury prayed the advice of the Court.

Note, that this Plea began Trin. 5 Jacobi, Rot. 1405. And upon

Argument at the Bar, and at the Bench, it was resolved by the whole Court, that it ought to be found against the Defendant, who had traversed the Prescription: For although that all the two yard Lands had been demised for years, yet the Prescription made by the Plaintiff is true; for he is seised in his Demesn as of Fee of the Freehold of the two yards of Land, to which, &c. And without question the Inheritance and freehold of the Common, after the years determined, is appendant to the said two yard Lands; and therefore clearly the issue is to be found against the Defendant: But if he would take advantage of the matter in Law, he ought (confessing the Common) to have pleaded the said Lease; but when he traverseth the Prescription, he cannot give the same in evidence.

2. It was resolved, That if the said Lease had been pleaded, that the Common, during the Lease for years, is not suspended or discharged; for each of them shall have Common Rateable, and in such manner, that the Land in which, &c. shall not be surcharged: and if so small a parcel be demised, which will not keep one Ox, nor a Sheep, then the whole Common shall remain with the Lessor, so always as the Land in which be not surcharged.

3. It was resolved, That Common appendant unto Land, is as much as to say, Common for Cattel levant and couchant upon the Land in which, &c. So that by the severance of part of the Land to which, &c. no prejudice can come to the Terre-tenant in which, &c.

4. See the Case of in the fourth part of my Reports, fo. was affirmed for good Law: and there is no difference, when the Prescription is for Cattel levant and couchant, and for a certain number of Cattel levant and couchant: But when the Prescription is for Common appurtenant to Land without (alledging that it is for Cattel levant and couchant) there a certain number of the Cattel ought to be expressed, with are intended by the Law to be levant and couchant.

XXXII. Hil. 7 Jacobi Regis: In the Common-Pleas.

Hughes and Crowthers Case.

IN a Replevin, between Robert Hughs Plaintiff, and Richard Crowther Defendant, which began, Trin. 6 Jacobi, Rot. 2220. The Case was, that Charles Fox was seised of fix acres of Meadow in Bedston, in the County of Salop, in Fee, and 10 Octob. 9 Eliz. leased the same to Charles Hibbens, and Arthur Hibbens for 60 years, if the aforesaid Charles Hibbens and Arthur Hibbens should so long live, and afterward Charles died; and if the Lease determine by his death was the Question, and it was adjudged, That by his death the Lease was determined; for the life of a man is mer collateral unto the Estate for years: otherwise it is, if a Lease be made to one for the lives of J. S. and J. N. there the Freehold doth not determine by the death of one of them, for the reasons and causes given in the Case of Brudnel, in the fifth part of my Reports, fo. 9. Which Case was affirmed to be good Law by the whole Court.

Easter

XXXIII. Easter Term, anno 8 Jacobi: In the Common-Pleas.

Heydon and Smiths Case.

RIchard Heydon brought an Action of Trespass against Michael Smith and others, of breaking of his Close called the Moor in Ugley in the County of Essex, the 25 day of June in the fifth year of the King, & quandam arborem suam ad valentiam 40 s. ibidem nuper crescen. succiderunt: The Defendants said, that the Close is, and at the time of the Trespass was the Freehold of Sir John Leventhrop Knight, &c. and that the said Oak was a Timber Tree of the growth of thirty years and more, and justifies the cutting down of the Tree by his commandment: The Plaintiff replyeth and saith, That the said Close, and a House, and 28 Acres of Land in Ugley, are Copyhold, and parcel of the said Mannor of Ugley &c. of which Mannor Edward Leventhrop Esquire, Father of the said Sir John Leventhrop, was seised in Fee, and granted the said House, Lands and Close to the said Richard Heydon and his Heirs by the Rod at the Will of the Lord, according to the custom of the said Mannor: and that within the said Mannor there is such a custom, Quod quilibet tenens Customar. ejusdem Manerii sibi, & hæredibus suis, ad voluntatem Domini, &c. à toto tempore supradicto usus fuit, & consuevit ad ejus libitum amputare ramos omnimodarum arborum, called Pollingers, or Husbords, super terris & tenem. suis Customar. crescen. pro ligno combustibili, ad like libitum suum applicand. & in prædicto Messuagio comburend. and also to cut down and take at their pleasure all manner of Trees called Pollengers or Husbords, and all other Timber Trees, super ejusdem Customariis suis crescen. for the reparation of their Houses built upon the said Lands and customary Tenements; and also for Ploughbote and Cartbote; and that all Trees called Pollengers or Husbords, and all other trees at the time of the Trespass aforesaid, or hitherto growing upon the aforesaid Lands and Tenements customary of the said Richard Heydon, were not sufficient, nor did serve for the necessary uses aforesaid: And that the said Richard Heydon, from the time of the said Grant made unto him, had maintained and preserved all trees, &c. growing upon the said Lands and Tenements to him granted: And that after the death of the said Edward Leventhrop, the said Mannor descended to the said Sir John Leventhrop: and that at the time of the Trespass the aforesaid Messuage of the said Richard Heydon was in decay, & egebat necessariis reparationibus in Maremio ejusdem. Upon which the Defendant did demur in Law.

And this Case was oftentimes argued at the Bar: and now this Term it was argued at the Bench by the Justices: And in this case these points were resolved.

1. That the first part of the Custom was absurd and repugnant, scil. Quod quilibet tenens Customarii ejusdem Manerii habens & tenens aliqua

terras seu tenementa Custom. &c. usus fuit amputare ramos omnimodarum arborum, vocat. Pollingers, &c. pro ligno combustibili, &c. in prædicto Messuagio comburend. (which ought to be in the Messuage of the Plaintiff, for no other Messuage is mentioned before) which is absurd and repugnant, That every customary Tenant should burn his Fuel in the Plaintiffs house: But that Branch of the Custom doth not extend unto this case: for the last part of the custom, which concerneth the cutting down of the Trees, concerns the point in question; and so the first part of the custom is not material.

It was objected, That the pleading, that the Messuage of the Plaintiff was in decay, & egebat necessariis reparationibus in maremio ejusdem, was too general: for the Plaintiff ought to have shewed in particular, in what the Messuage was in decay: as the Book is in 10 E. 43. He who justifieth for Housebote, &c. ought to shew that the House hath cause to be repaired, &c.

To which it was answered by Coke chief Justice, That the said Book proved the pleading in the case at Bar was certain enough, scil. Quod Messuagium præd. egebat necessariis reparationibus in maremio, without shewing the precise certainty: and therewith agrees 7 H. 6. 38. and 34 H. 6. 7.

2. It was also answered and resolved, That in this case without question it needs not to alledg more certainty, for here the Copyholder according to the custom doth not take it, but the Lord of the Manor doth cut down the Tree, and carryeth it away where the rest was not sufficient, and so preventeth the Copyholder of his benefit, and therefore he needeth not to shew any decay at all, but onely for increasing of the damages, for the Lord doth the wrong when he cutteth down the Tree which should serve for reparations when need should be.

3. It was resolved, That of common Right, as a thing incident to the Grant, the Copyholder may take Housebote, Hedgbote, and Plowbote upon his Copyhold: Quia concesso uno conceduntur omnia sine quibus id consistere non potest: Et quando aliquis aliquid concedit, concedere videtur & id sine quo res ipsa esse non potest: and therewith agreeth 9 H. 4. Waste 59. But the same may be restrained by custom, scil. That the Copyholder shall not take it unless by assignment of the Lord or his Bayliff, &c.

4. It was resolved, That the Lord cannot take all the Timber Trees, but he ought to leave sufficient for the Reparation of the Customary houses, and for Ploughbote, &c. for otherwise great Depopulation will follow; scil. Ruine of the Houses, and decay of Tillage and Husbandry. And it is to be understood, That Bote being an ancient Saxon word, hath two significations; the one compensatio criminis, as Frithbote, which is as much as to say, to be discharged from giving amends for the breach of the peace; Manbote, to be discharged of amends for the death of man: And secondly, in the latter signification, (scil.) for Reparation, as was Bridgbote, Burghbote, Castlebote, Parkbote, &c. scil. Reparation of a Bridg, of a Borough, of a Castle, of a Park, &c. And it is to be known, that Bote and Estovers are all one: Estovers are derived of this French word, Estover, i. e. fovere; i. e. to keep warm, to cherish, to sustain, to defend: And there are four kinds of Estovers, (scil.) ardendi, arandi, construendi, & claudendi: (scil.) Firebote, Housebote, Ploughbote, and Hedgbote.

5. It was resolved, That the Copyholder shall have a general Action of Trespass against the Lord, Quare clausum fregit, & arborem suam,

sham, &c. succidit; for Custom hath fixed it to his Estate against the Lord: and the Copyholder in this case hath as great an interest in the Timber Trees, as he hath in his Messuage which he holdeth by Copy: and if the Lord breaketh or destroyeth the House, without question the Copyholder shall have an Action of Trespass against his Lord, Quare Domum fregit, and by the same reason for the Timber Trees which are annexed to the Land, and which he may take for the Reparation of his Copyhold Messuage, and without which the Messuage cannot stand. Trinit. 40 Eliz. Rot. 37. in the Kings-Bench, between Stebbing and Grosener. The Custom of the Mannor of Netherhall in the County of Suffolk was, that every Copyholder might lop the Pollengers upon his Copyhold pro ligno combustibili, &c. And the Lord of the Mannor cut down the Pollingers, being upon the Plaintiffs Copyhold, upon which he brought his Action upon the case, because that the lops of the Trees in such case did belong to the Copyholder, and they were taken by the Lord. See Taylors case in the fourth part of my Reports 30 and 31. and see 5 H. 4. 2. Guardian in Knight-service, who hath Custodiam terræ, shall have an Action of Trespass for cutting down the Trees against the Heir who hath the inheritance: Vide 2 H. 4. 12. A Copyholder brought an Action of Trespass, Quare clausum fregit, & arbores succidit: and see 2 E. 4. 15. A Servant who is commanded to carry goods to such a place, shall have an Action of Trespass or Appeal: 1 H. 6. 4. 7 H. 4. 15. 19 H. 6. 34. 11 H. 4. 28. If after taking the goods, the owner hath his goods again, yet he shall have a general Action of Trespass, and upon the evidence the damages shall be mitigated: so is the better Opinion in 11 H. 4. 23. That he who hath a special property of the goods at a certain time, shall have a general Action of Trespass against him who hath the general property, and upon the evidence damages shall be mitigated; but clearly, the Bayliæ, or he who hath a special property, shall have a general Action of Trespass against a stranger, and shall recover all in damages, because that he is chargeable over. See 21 H. 7. 14. b. acc. And it is holden in 4 H. 7. 3. That Tenant at sufferance shall have an Action of Trespass in respect of the possession, and if the Defendant plead Not-guilty, but he cannot make title, 30 H. 6. Trespass 10. 15 H. 7. 2. the King, who hath profits of the Land by Out-lawry, shall have an Action of Trespass, or take goods damage-feasants: 35 H. 6. 24. 30 H. 6. Tresp. 10. &c. Tenant at will shall have an Action of Trespass: 21 H. 7. 15. and 11 H. 4. 23. If a man Bayl goods which are taken out of his possession, if the Bayliæ recover in Trespass, the same shall be a good Bar to the Bayliæ: 5 H. 4. 2. In a Writ of Waste brought against Tenant for life, and assigned the Waste in cutting down of Trees: the Defendant pleaded in Bar, that the Plaintiff himself cut them: and Culpeper, the Serjeant of the Plaintiff, objected against it, that it should be no Plea, because the Defendant had not any thing in the Freehold, no more than a meer stranger; and if a stranger had cut down the same Trees, he should be chargeable in Waste.

Also in this case, we should be at a mischief if we should not recover against him; for if at another time he bringeth an Action of Trespass against us, he shall recover damages against us for the cutting, id est, for the value of the Trees: and yet it was holden by the Court, that the same was a good Bar: And it was said by the Court that the Plaintiff was not at any mischief in this case: for in as much as the Defendant shall

shall have advantage now to discharge himself of Waste against the Plaintiff, upon this matter he shall be barred for ever of his Action of Trespass, scil. to recover the value of the Trees, which was the mischief objected by Culpeper: But without question he shall have an Action of Trespass, Quare clausum fregit, for the Entry of the Lessor and for the cutting of the Trees, but he shall not recover the value of the Trees, because he is not chargeable over, but for the special loss which he hath, scil. for the loss of the Pawnage and of the shadow of the Trees, &c. See Fitz. Trespass ultimo, in the Abridgment: And afterwards, the same Term, Judgment was given on the principal case for the Plaintiff. in Hill 13 W. 3. regis in BR: inter Ashmead & Ranger sunt Judicium. fuit Dat et idem affirmat in Scacc. sed postea in Domo procerum Ipsa Judicia reversat fuer. fol. procerei Contra. 10.

XXXIV. Easter Term, 8 Jacobi: In the Common-Pleas.

THe Parishioners of St. Alphage in Canterbury by custom ought to choose the Parish-Clark, whom they chose accordingly: The Parson of the Parish, by colour of a new Canon made at the Convocation in the year of the King that now is (which is not of force to take away any Custom) drew the Clark before Doctor Newman, Official of the Archbishop of Canterbury, to deprive him, upon the point of the right of Election, and for other causes; and upon that it was moved at the Bar to have a Prohibition: And upon the hearing of Doctor Newman and himself, and his Councel, a Prohibition was granted by the whole Court, because the party chosen is a meer temporal man, and the means of choosing of him, scil. the custom, is also meer temporal, so as the Official cannot deprive him; but upon occasion the Parishioners might displace him; And this Office is like to the Office of a Churchwarden, who although they be chosen for two years, yet for cause they may displace them, as it is holden in 26 H. 8. 5. And although that the execution of the Office concerneth Divine Service, yet the Office it self is meer temporal: See 3 E. 3. Annuity 30. He who is Clark of a Parish is removable by the Parishioners: See 18 E. 3. 27. A gift in tayl was made of the Serjanty or Clarkship of the Church of Lincoln, and there adjudged, that the Office is temporal, and shall not be tryed in the Ecclesiastical Court, but in the Kings Court: And it is to be known, that the deprivation of a man of a temporal Office, or place, is a temporal thing, upon which no Appeal lyeth by the Statute of 25 H. 8. but an Assise, as in 4 Eliz. Dyer 209. The President of Magdalen Colledg in Oxford was deprived of the Bishop of Winchester their Visitor; He shall not have an Appeal to the Delegates, for the Deprivation is temporal, and not spiritual; but he may have an Assise: and therewith agreeth the Book of 8 Ass. Siracses Case: But if a Dean of a Cathedral Church, of the Patronage of the King, be deprived before the Commissioners of the King, he may appeal to the Delegates within the said Act of 25 H. 8. For a Deanry is a spiritual promotion, and not temporal: and before the said Act, in such case, the Appeal was to Rome immediately.

Mich.

XXXV. Mich. Term, 5 Jacob. Rot. 30. In the Kings-Bench.

Prichard and Hawkins Case.

JOhn Prichard brought an Action upon the Case against Robert Hawkins for slanderous words published the last day of August in the third year of the King, viz. That Prichard which serveth Mistris Shelley did murder John Adams Child, (Quandam Isabellam Adams modo defunct. filiam cujusdam Johannis Adams, of Williamstre in the County of Gloceſter, innuendo) upon which a Writ of Error was brought in the Exchequer Chamber upon a Judgment given for Prichard in the Kings-Bench: and the Judgment was reversed in Easter Term, 7 Jacobi, because that it doth not appear, that Isabel was dead at the time of the speaking the words. for tunc defunct. ought to have ben in the place of modo defunct.

XXXVI. Easter Term, 8 Jacobi: In the Kings-Bench.

Dison and Bestneys Case.

HUmphrey Dison said of Nicolas Bestney, utter Bareſter and Counceller of Grays-Inn, Thou a Bareſter? Thou art no Bareſter, thou art a Barretor; Thou wert put from the Bar, and thou dareſt not shew thy self there. Thou study Law? Thou hast as much wit as a Daw. Upon Not-guilty pleaded, the Jury found for the Plaintiff, and assessed damages to 23 l. upon which Judgment was given: and in a Writ of Error in the Exchequer Chamber, the Judgment was affirmed.

XXXVII. Easter Term, 8 Jacobi Regis: In the Kings-Bench.

Smith and Hills Case.

NOah Smith brought an Action of Assault and Battery against Walter Hill in the Kings-bench, which began Pasch. 7 Jacobi, Rot. 175. upon Not-guilty pleaded, a Verdict and Judgment was for the Plaintiff, and 107 l. assessed for damages and costs. In a Writ of Error brought in the Exchequer Chamber, the Error was assigned in the Venire facias, which was certified by Writ of Certiorari: and upon the Writ no Return was made upon the back of the Writ, which is called Returnum album; and for that cause, this Easter Term the Judgment was reversed.

Trinity

XXXVIII. Trinity Term, 7 Jacobi: In the Court of Wards.

Westcots Case.

IT was found by a Writ of Diem clausit extremum, after the death of Roger Westcot, That the said Roger the day that he dyed was seised of and in the moyety of the Mannor of Trewalliard in his Demesn as of Fee, and of such his Estate dyed thereof seised: and that the moyety of the said Mannor, anno 19 E. 3. was holden of the then Prince, as of his Castle of Trematon, parcel of his Dutchy of Cornwall, by Knights-service, as it appeareth by a certain exemplification of Trematon for the same Prince, made 9 Marcii, 19 E. 3. And the words of the Extent were, Willielmus de Torr tenet duo feoda & dimid. militis apud Pick, Strikleftomb, & Trewalliard, per servitium militare, & reddit inde per annum 0 s. And it was resolved by the two chief Justices and the chief Baron, That the Office concerning the Tenure was insufficient and voyd, because that the Verdict of a Jury ought to be full and direct, and not with a prout patet, for by that the whole force of the Verdict relyeth onely upon the Extent, which if it be false, he who is grieved shall have no remedy by any Traverse; for they have not found the Tenure indefinite which might be traversed, but with a prout patet, which makes the Office in that point insufficient, and upon that a Melius inquirendum shall issue forth: and therewith agreeth F. N. B. 255. that a Melius inquirendum shall be awarded in such a Case.

The

The

Names of the Cases.

Case of the admiralty 7 Jac. 51.
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Baron and Boyes case 6 Jac. 18.
Case of repairing Bridges, &c. 7 Jac. 33.
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Case in Chancery, Hil. 27 Eliz. 19.
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Collings and Hardings case 39 Eliz. 57.
Case of Modus decimandi 6 Jac. 12.
Case de Modo Decimandi and of prohibitions before the King 7 Jac. 37.
Disow and Bestneys case 8 Jac. 71.
Edwards case 6 Jac. 9.
Case in ejectione firmæ 7 Jac. 58.
Hulms case 7 Jac. 61.
Haywards and Sr. John Whitebrookes case 64.
Hughes and Crowthers case 7 Jac. 66.
Haidon and Smiths case 8 Jac. 67.
Muttons case, 7 Jac. 59.
More and Webbs case 7 Jac. 65.
Neale and Rowses case 6 Jac. 24.
Porter and Rochesters case 6 Jac. 4.
Ca. of prohibition 6 Jac. 30.
Sir. Allen Percies case 7 Jac. 60.
Parliaments case 7 Ja. 63.
Prichard and Haukins case 5 Jac. 71.
Sir William Reads and Boothes case 7 Jac. 34.
Syrat and Heales case 44 Eliz. 23.
Case of Sewers 7 Jac. 35.
Sparyes case 7 Jac. 49.
Samms case 7 Jac. 54.
Smith and Hils case 8 Jac. 71.
Taylor and Moyls case 6 Jac. 11.
Willowes case 6 Jac. 1.
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